No. 1617

In the Supreme Court of the United States

OCTOBER TERM, 1952

DISTRICT OF COLUMBIA, PETITIONER

v.

JOHN R. THOMPSON COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The order of the Municipal Court quashing the information (R. 4) is not reported. The opinions in the Municipal Court of Appeals (R. 25–53) are reported at 81 A. 2d 249. The opinions in the United States Court of Appeals for the District of Columbia Circuit (R. 60–120) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1953 (R. 121). The petition for a writ of certiorari was filed on February

20, 1953, and was granted on April 6, 1953. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two laws which made it a criminal offense for owners of restaurants and certain other places of public accommodation (hotels, barber shops, ice-cream parlors, bar-rooms, and bathing-houses) to refuse to serve any "respectable well-behaved" person because of his race, color, or previous condition of servitude.[1] The Court of Appeals for the District of Columbia Circuit has held in this case that these two laws are not enforceable. The questions presented are:

1. Whether the Acts of 1872 and 1873 were valid when enacted.

2. If so, whether they are still in full force and effect.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set out in the Appendix, *infra,* pp. 89–100.

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[1] Violation was made punishable as a misdemeanor by a $100 fine. As an additional sanction, the Acts provided that an offender should forfeit his license for one year (Appendix, *infra*, pp. 96–100).

STATEMENT

On July 27, 1950, three persons entered a restaurant owned by respondent in Washington, D. C. Two of these persons were colored, and for that reason they were not served. The Corporation Counsel for the District of Columbia thereafter filed in the Municipal Court an information in four counts (R. 1–3), charging violations of the Acts of the Legislative Assembly of the District of Columbia enacted on June 20, 1872, and June 26, 1873 (Appendix, *infra*, pp. 95–100).

In the Municipal Court, Judge Myers quashed the information on the ground that the 1872 and 1873 Acts had been held by him in an earlier prosecution involving the same defendant (R. 4–17) to have been repealed by implication as a result of the enactment by Congress of the Organic Act of June 11, 1878, 20 Stat. 102 (R. 3–4).

On appeal, a majority of the judges of the Municipal Court of Appeals held that the 1872 and 1873 Acts were valid when enacted, and that the latter Act (but not the former, in so far as it related to restaurants) had not been repealed.[2]

[2] Chief Judge Cayton was of the opinion that both the 1872 and 1873 Acts were valid and still in effect. (R. 26–37). Judge Clagett agreed as to the validity of both Acts, but thought that the 1873 Act had superseded the 1872 Act, so far as restaurants are concerned. (R. 37–52.) Judge Hood, dissenting, thought that both Acts were void *ab initio* (R. 52–53).

Accordingly, the order of the Municipal Court, in so far as it dismissed the counts based on the 1873 Act, was reversed; in so far as it dismissed the first count, based on the 1872 Act, the Municipal Court's order was affirmed. (R. 36–37.)

On cross-appeals by both respondent and the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, held that the entire information should be dismissed. (R. 89, 121.) The judgment of the Court of Appeals, holding that the Acts of 1872 and 1873 are not enforceable, was concurred in by five judges constituting a majority of the full court. The grounds for this holding are set forth in the separate opinions of Chief Judge Stephens (on behalf of Judges Clark, Miller, Proctor, and himself)[3] and Judge Prettyman (with whom Judge Miller also concurred).[4] Judge Fahy wrote a dissenting opinion in which Judges Edgerton, Bazelon, and Washington joined.[5]

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[3] R. 61–89.

[4] R. 89–100.

[5] R. 100–120. The dissenting judges were of the view that the 1873 Act was valid when enacted and had not been repealed. They agreed with Judge Clagett of the Municipal Court of Appeals (see footnote 2, *supra*) that the provisions in the 1873 Act relating to restaurants were in substitution for those contained in the 1872 Act, and hence superseded the latter Act *pro tanto*. For the reasons set out in footnote 46, *infra*, the Government, while agreeing with this conclusion of Judge Clagett and the dissenting judges in the court below, does not believe that the question whether the

Except in one relatively minor respect (see footnote 8, *infra*), Judge Prettyman's views on the basic issues in the case coincide with those expressed by Chief Judge Stephens. Both opinions agree on the following propositions:

(1) Congress lacks power under the Constitution to delegate authority to the District of Columbia to enact "general legislation"; only the authority to enact "regulatory" municipal ordinances" can constitutionally be delegated.[6]

1873 Act repealed the 1872 Act, so far as restaurants are concerned, need be reached and decided by this Court in the present posture of the case.

[6] See opinion of Chief Judge Stephens at R. 79, 82. The opinion of Judge Prettyman is equally explicit in expressing the view that Congress can delegate only the authority to enact "municipal regulations" and not "general legislation":

"* * * There are two possible views. Either they [the 1872 and 1873 Acts] were general legislation, *e. g.*, relating to civil rights, use of property, validity of contracts, or similar subjects; or they were municipal ordinances regulatory of licensed businesses. * * *

"The judges who join Chief Judge Stephens take the former view. There are reasons, which he describes, which support that view. From that premise I think the next steps in his opinion follow inevitably. If the enactments constituted legislation they were invalid when enacted by the Legislative Assembly, being beyond the power permitted a municipal body in the District of Columbia by the Constitution * * *.

* * * * *

"* * * They [the dissenting judges] say, first, that the Legislative Assembly was a legislative body. But, of course, it could not be a true legislative body. Under the Constitution the Congress is, and can be, the only legislative body for the District of Columbia. The Assembly was legislative

(2) Although Congress in the Organic Act of 1871 (16 Stat. 419) empowered the Legislative Assembly of the District of Columbia to deal with "all rightful subjects of legislation within said District," this delegation of legislative power could not, and did not, include authority to enact local anti-discrimination laws; such laws come within the proscribed category of "general legislation" even though applicable only within the District of Columbia.[7]

(3) To the extent that the Acts of 1872 and 1873 constitute "general legislation," they were

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only in the sense that the word applies to the adoption of municipal ordinances, and in that sense alone.

* * * * * * *

"* * * If they [the 1872 and 1873 Acts] were general legislation they were void from the beginning *. * *."

(R. 89, 97, 99.)

[7] The line between "general legislation" and "regulatory municipal ordinances" drawn by the majority judges of the Court of Appeals is concededly imprecise. (See footnote 8a, *infra*.) Chief Judge Stephens admitted "that, for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty" (R. 79). He thought it clear, however, that the Acts of 1872 and 1873 were "general legislation" because they limited the freedom of the owner of a restaurant "in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling" (R. 79) and were "in the nature of civil rights legislation" (R. 81).

Judge Prettyman agreed that acts "relating to civil rights" come within the prohibited class of "general legislation." He cited, as examples of "general legislation," those "relating to civil rights, use of property, validity of contracts, or similar subjects" (R. 89).

not only invalid when enacted but for the same reason were also repealed by the District of Columbia Code of 1901 (31 Stat. 1189).[8]

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents two separate and distinct issues: (1) Were the Acts of 1872 and 1873 valid when enacted by the Legislative Assembly of the District of Columbia? (2) If so, have they been repealed either by the provisions of the District of Columbia Code of 1901 (31 Stat. 1189) or by reason of the failure to enforce them over a long period of years?

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[8] The conclusion that the Acts of 1872 and 1873 were "general legislation" was regarded by the majority judges as also determinative of the question of repeal under the 1901 Code. Chief Judge Stephens expressly stated (R. 85) that the finding that the Acts of 1872 and 1873 were "general legislation" required the further conclusion that they were repealed by the 1901 Code. Judge Prettyman concluded that the 1872 and 1873 Acts are unenforceable, whether regarded as "general legislation" or "regulatory municipal ordinances." His reasoning was as follows: If the Acts of 1872 and 1873 constituted "general legislation," they were, for the reasons stated by Chief Judge Stephens, invalid when enacted, and in any event repealed by the 1901 Code; if the Acts were "regulatory municipal ordinances" and valid when enacted, they "must be deemed by the courts to have been abandoned by the licensing authority" (R. 89–90).

A

The validity issue depends upon the answers to two subsidiary questions: (a) As a matter of construction, did the District of Columbia Organic Act of 1871 (16 Stat. 419) empower the Legislative Assembly to enact laws of this character? (b) If so, did Congress act within its constitutional powers in delegating such authority to the District of Columbia?

Section 18 of the Organic Act of 1871 provided that "the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act * * *." Construing substantially identical provisions in other territorial organic acts, this Court has held in numerous cases that they constitute delegations by Congress of comprehensive authority to legislate on local matters. The language of the Organic Act of 1871, interpreted in accordance with these decisions, clearly empowered the Legislative Assembly of the District of Columbia to enact local anti-discrimination laws like the Acts of 1872 and 1873.

The delegation of local legislative authority in the Organic Act of 1871 was constitutional. The decisions of this Court establish that Congress has ample power under the Constitution to delegate to the federal territories, including the District of Columbia, authority to legislate on local

matters. In this respect the District of Columbia does not differ from other federal territories. Article I, Section 8, clause 17 of the Constitution gives Congress power to exercise "exclusive" legislation over the District; but the word "exclusive" does not mean "non-delegable." Its purpose was simply to prevent the ceding states from exercising legislative authority in the territory embraced within the District. It does not, as the Court has recognized, preclude Congress from establishing a local government in the District with full authority to legislate on subjects of local concern. Moreover, that provision of the Constitution gives Congress all the powers which may be exercised by a state in dealing with one of its cities, and there is no principle of constitutional law which forbids a state to delegate authority to a city to enact local anti-discrimination legislation.

In the court below and in the Municipal Court of Appeals, it appears to have been generally assumed that the validity issue hinged upon whether the 1872 and 1873 Acts were "general legislation" or "municipal regulations." The applicability of this distinction, as a criterion for determining the validity of the Acts, seems to have been accepted even by some of the judges who found the Acts valid. Thus, in the Municipal Court of Appeals both Chief Judge Cayton (R. 28–32) and Judge Clagett (R. 44–47), while

concluding that the Acts were valid, accepted the premise that they would be invalid if they were "general legislation." In the court below the dissenting opinion of Judge Fahy expressly put to one side the question "whether Congress intended to grant the Legislative Assembly power to enact laws of a character more general than municipal ordinances or whether such an intent could constitutionally be carried out in this District" (R. 109). Since the majority judges in the court below conceded that the Legislative Assembly could unquestionably enact "municipal regulations" to the same extent as an ordinary municipality possessing usual municipal powers, the dissenting judges thought it unnecessary to go further than to hold that the provisions of these Acts were "regulations of a municipal or local character" which could validly be enacted by an ordinary municipality within a state, unless specifically barred by state law.

The United States agrees, for the reasons stated in the dissenting opinion of Judge Fahy, that the Acts of 1872 and 1873 are "local" and "municipal," and that if such a test of validity be accepted, there could be no question that these Acts are to be classified as "municipal or local regulations" within the competence of any municipality to enact, unless expressly prohibited by controlling law. The regulation of service in restaurants and other places of public accommoda-

tion is traditionally regarded as a proper subject of local concern. An anti-discrimination regulation, prohibiting denial of service because of race or color, is no less local than other types of regulation familiarly used by municipalities in the interest of public health, safety, and welfare. Municipal governments throughout the country have exercised authority to enact local ordinances dealing with racial discrimination in public places; and it has never been believed that such laws could be enacted only by state legislatures on a uniform state-wide basis.

The Government respectfully submits, however, with all deference to the judges in the courts below who dealt with the validity issue by attempting to ascertain whether the 1872 and 1873 Acts were "general" or "municipal" in nature, that the issue should not be considered and determined by this Court on that basis. We believe that the distinction between "general legislation" and "municipal regulations" is neither relevant nor useful as a test of the validity of the Acts, which depends solely upon the construction and constitutionality of the Organic Act of 1871.

The *raison d'être* of the distinction between "general" and "municipal" subjects of legislation does not exist in the District of Columbia. The distinction has a respected place in the law of municipal corporations applied in the states. In that context, the considerations upon which

it is based and the use to which it is put by the courts are reasonable and proper. Where the charter of a city empowers it, in general terms, to enact "municipal ordinances or regulations", the question may arise whether a particular enactment falls within the scope of the authority thus delegated. In the absence of express constitutional or statutory provision, state courts generally invoke a canon of construction or rule of presumption that the state legislature is presumed to have reserved to itself the power to enact legislation dealing with matters which are of state-wide concern and call for uniform state-wide treatment by the legislature. Such matters are described as the subjects of "general legislation"; a familiar example is the law of marriage and divorce. On the other hand, matters which may appropriately be dealt with on a local basis by municipalities in accordance with local needs and desires, and as to which there is no necessity for uniform state-wide treatment, are regarded as proper subjects of "municipal ordinances or regulations."

The problem before the state courts in such cases is entirely different from that presented here. There the state courts use the distinction between "general" and "municipal" as an aid to construction, in determining how much authority has been delegated; like other such aids, it yields to a plain manifestation of contrary

legislative intent. If must be emphasized that the distinction is used by the state courts for the purpose of determining what the state *has* delegated, not what it can delegate. It is based, not upon any inherent limitation on municipal power, but solely upon a presumed policy favoring state-wide uniformity of legislation in certain fields—a policy which a state is entirely free to alter as it sees fit. There is no rule of constitutional law which denies a state power to delegate authority to a municipality to enact "general" legislation effective within its own borders. On the contrary, this Court has in many cases held that a legislature may give a municipality "all the powers such a being is capable of receiving, making it a miniature State within its locality." *Barnes v. District of Columbia,* 91 U. S. 540, 544.

The danger which use of the distinction is intended to avert, namely, that municipalities within a state might each enact different and conflicting laws upon a subject-matter as to which the state deems it desirable that there be a uniform state-wide rule, does not exist in the District of Columbia as it was constituted by the Organic Act of 1871 and as it exists today. In the District the powers of local government are geographically coextensive with the entire area of the territory, and there can be no problem of conflicting laws enacted by different municipalities within the District.

Finally, even in the context of the law of municipal corporations where it evolved and has a proper place, it has been recognized (see opinion of Chief Judge Stephens, R. 79) that the utility of the distinction is impaired by the fact that it is intrinsically vague and indefinite.[8a] To transplant it to the context of federal constitutional law, in which it can have no proper place, as a yardstick for measuring the extent of the power of Congress to grant legislative authority to the District of Columbia, would serve only to introduce extraneous conceptual difficulties and needless confusion and uncertainty into what is essentially a simple problem. "Too broadly gen-

[8a] See McQuillin, *Municipal Corporations* (3d ed. 1949), section 4.85, which, after reviewing the cases on this subject, concludes that "there are no well-established rules or principles by which to determine what are municipal and what are state affairs." An illustration is *Adler* v. *Deegan*, 251 N. Y. 467, upholding the validity of the state's Municipal Dwelling Law as against the contention that it dealt with local affairs reserved for municipal legislation. Separate opinions were written by Cardozo, C. J., and Crane, Pound, Lehman, and O'Brien, JJ., expressing differing views as to where "the line of division between city and State concerns" (opinion of Cardozo, C. J., p. 489) should be drawn. In an earlier case, *Matter of Mayor, etc., of New York (Elm St.)*, 246 N. Y. 72, Chief Judge Cardozo's opinion for the court abandoned hope of obtaining a working definition of the distinction (p. 78): "Futile is the endeavor to mark the principle of division with the precision or binding force of a codifying statute. Any statement attempted will need to be shaded down or enlarged to meet the exigencies of particular instances as hereafter they develop."

eralized conceptions are a constant source of fallacy." *Lorenzo* v. *Wirth,* 170 Mass. 596, 600 (Holmes, J.).

B

The 1872 and 1873 Acts were neither repealed by the 1901 Code nor "abandoned", as Judge Prettyman suggested (R. 89–100), through non-enforcement.

The 1901 Code did not specifically or expressly repeal these Acts, nor are they inconsistent with or replaced by any provisions of the Code, which was, as its legislative history and terms show, intended only as a partial codification of the laws then applicable in the District. The Code was enacted principally as a codification of the general statutes of the Maryland legislature then in effect in the area of the District ceded by that state, and of acts of Congress applicable solely to the District. It was not intended to replace or repeal existing Acts and ordinances, like the Acts of 1872 and 1873, which would be included within a municipal code. In any event, this is an appropriate case for application of the well-settled rule of construction that "repeals by implication are not favored" and that the "intention of the legislature to repeal 'must be clear and manifest'." *United States* v. *Borden Co.,* 308 U. S. 188, 198–199, and cases cited.

Judge Prettyman's alternative ground, that the

1872 and 1873 Acts are not now enforceable because they have been "abandoned" by reason of the long failure to enforce them (R. 90), is clearly without substance. Judge Fahy correctly pointed out in the dissenting opinion (R. 114) that the theory of repeal by abandonment rests upon the premise that the 1872 and 1873 Acts were mere conditions imposed upon licenses by the licensing authority. The Acts themselves demonstrate the error of this premise. In express terms they impose an affirmative legal duty of non-discrimination in service upon owners of restaurants in the District, and make violation of that duty a penal offense punishable by fine. The provision for forfeiture of license for one year was merely an additional civil sanction imposed upon the violator. Moreover, even if the Acts be regarded as only imposing conditions upon licenses, there is no basis for finding in any action or inaction of the District Commissioners in exercising their licensing and enforcement powers an implied purpose to repeal these Acts.

I

THE ACTS OF 1872 AND 1873 WERE VALIDLY ENACTED BY THE LEGISLATIVE ASSEMBLY OF DISTRICT OF COLUMBIA.

A. *The language and purpose of Article I, Section 8, clause 17 of the Constitution.*

The government of the District of Columbia was specifically provided for by Article I, Section

8, clause 17 of the Constitution, which reads as follows:

> The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *.

This Court has frequently noted "the plenary power to legislate for the District of Columbia, conferred by Art. I, § 8, cl. 17 of the Constitution. Under that clause, Congress possesses not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed." *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434–435. See also *Civil Rights Cases,* 109 U. S. 3, 19; *Mattingly* v. *District of Columbia,* 97 U. S. 687, 690; *Hornbuckle* v. *Toombs,* 18 Wall. 648, 655; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 147. In the last-cited case the Court stated: "Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible" (129 U. S. at 147).

The word "exclusive" in Article I, Section 8, clause 17, does not, as the majority judges in the

Court of Appeals seemed to assume, mean "non-delegable." It was put there solely to make it clear that the law-making authority of Congress should be exclusive and not concurrent with that of the ceding states. See Elliott's *Debates in the Several States on the Adoption of the Federal Constitution* (1854), Vol. III (Virginia), pp. 430–441;[9] *The Federalist*, No. 43; Story, *Commentaries on the Constitution* (4th ed. 1873), vol. 2, secs. 1216–1223; Crosskey, *Politics and the Constitution in the History of the United States* (1953), vol. 1, pp. 493–494. The Supreme

[9] Some delegates to the Virginia Convention feared that the grant of "exclusive" legislative power in the district of the seat of government would enable Congress to enact oppressive laws there. James Madison thought there was no basis for such apprehension (Elliott's *Debates*, *supra*, pp. 432–433):

"* * * I believe that, whatever state may become the seat of the general government, it will become the object of the jealousy and envy of the other states. Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether. How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the session and deliberations of Congress, would they be secure from insults, or the influence of such state? If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress?"

Court of the District of Columbia, in 1879, correctly observed "that the term 'exclusive' has reference to the States, and simply imports *their* exclusion from legislative control of the District, and does not necessarily exclude the idea of legislation by some authority subordinate to that of Congress and created by it;" *Roach* v. *Van Riswick,* MacArthur & Mackey 171, 174; and see opinion of Circuit Judge Taft in *Grether* v. *Wright,* 75 Fed. 742, 756–57 (C. A. 6), quoted

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Edmund Pendleton also believed that Congress needed such "exclusive" power (*id.*, pp. 439–441):

"Mr. Chairman, this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large. But it gives them power over the local police of the place, so as to be secured from any interruption in their proceedings. Notwithstanding the violent attack upon it, I believe, sir, this is the fair construction of the clause. It gives them power of exclusive legislation in any case within that district. What is the meaning of this? What is it opposed to? Is it opposed to the general powers of the federal legislature, or to those of the state legislatures? I understand it as opposed to the legislative power of that state where it shall be. What, then, is the power? It is, that Congress shall exclusively legislate there, in order to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be. This is the fair construction. Can we suppose that, in order to effect these salutary ends, Congress will make it an asylum for villains and the vilest characters from all parts of the world? Will it not degrade their own dignity to make it a sanctuary for villains? I hope that no man that will ever compose that Congress will associate with the most profligate characters."

approvingly in *O'Donoghue* v. *United States*, 289 U. S. 516, 539. Accord: *Barnes* v. *District of Columbia*, 91 U. S. 540, 544; *Welch* v. *Cook*, 97 U. S. 541, 542; *National Bank* v. *Shoemaker*, 97 U. S. 692, 693; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147; *Binns* v. *United States*, 194 U. S. 486, 491. These cases are clear authorities that the "exclusive" power of Congress to legislate for the District of Columbia includes the power to establish a subordinate local government for the District with appropriate legislative authority.[10]

The framers of the Constitution apparently took it for granted that local self-government would be established for the District of Columbia. Madison wrote in *The Federalist*, No. 43: "a municipal legislature for local purposes, derived

[10] Further support for this construction is to be found in the cases arising under the second part of Article I, Section 8, clause 17. After granting power to Congress to "exercise exclusive Legislation" over the area of the seat of government, the clause empowers Congress "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings; * * *."

It has been held in many cases that the "exclusive" power of Congress under the latter part of the clause does not preclude delegation to the ceding states of authority to exercise appropriate local legislative authority over such ceded areas. See, *e. g.*, *Mason Co.* v. *Tax Commission*, 302 U. S. 186, 207–208; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 100–101. Congress has expressly provided that state workmen's compensation laws shall be applicable in such areas, 40 U. S. C. 290, and the constitutionality of this legislation has not been doubted. *Capetola* v. *Barclay White Co.*, 139 F. 2d 556 (C. A. 3); *Ottinger Bros.* v. *Clark*, 131 P. 2d 94 (Okla.).

from their own suffrages, will of course be allowed them [the inhabitants of the District].[11] And almost immediately upon assuming control over the District, Congress established local governments, with popularly-elected legislative bodies, which continued until 1871.

B. *Congressional legislation dealing with the District of Columbia, prior to 1871*

The history of Congressional legislation dealing with the District of Columbia, beginning with the Act of July 16, 1790, 1 Stat. 130, in which the District was established as the permanent seat of the government of the United States, leaves no doubt that Congress has consistently recognized its power to delegate local legislative authority to the District. Indeed, until the Commissioner form of government was adopted in the Temporary Organic Act of 1874, 18 Stat. 116, the role of Congress in local government for the District was confined to protection of federal buildings and other property. *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 5.

The Act of July 16, 1790, 1 Stat. 130, provided that a "district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, * * * is hereby accepted for the permanent seat of the government of the United States." When the United

[11] The context of this statement is quoted in the opinion of Judge Clagett in the Municipal Court of Appeals (R. 37–38).

States took possession of the District of Columbia in December 1800, it was divided by Congress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; the laws of Virginia were continued over the former, and the laws of Maryland over the latter. Act of February 27, 1801, 2 Stat. 103.

Within part, but not all, of the area of the county of Washington were the cities of Washington and Georgetown. The latter had been incorporated by the Maryland legislature in 1789, and its status and powers were continued by Congress. Act of February 27, 1801, 2 Stat. 103, 108. In 1802 the city of Washington was incorporated by Congress and endowed with the usual powers of a municipal government. It had a mayor, and its council, elected by the white male residents of the city, was empowered to pass by-laws and ordinances. Act of May 3, 1802, 2 Stat. 195; and see Act of February 24, 1804, 2 Stat. 254.

In 1805 Congress amended the charter of the city of Georgetown to provide for a board of aldermen and a common council, both to be elected by the "free white male citizens" of the city, and having the usual legislative powers of a municipal government. Act of March 3, 1805, 2 Stat. 332. In 1812 the charter of the city of Washington was amended in similar fashion. Act of May 4, 1812, 2 Stat. 721. The county of Wash-

ington was governed by a levy court composed of seven commissioners appointed by the President. Act of July 1, 1812, 2 Stat. 771. The county of Alexandria was re-ceded to Virginia by the Act of July 9, 1846, 9 Stat. 35.

This pattern of local government within the District continued, substantially unchanged, until the Organic Act of February 21, 1871 (16 Stat. 419) abolished the cities of Washington and Georgetown and the county of Washington, and established a single unified government for the entire District of Columbia. See Acts of May 15, 1820, 3 Stat. 583; May 17, 1848, 9 Stat. 223; August 6, 1861, 12 Stat. 320; March 3, 1863, 12 Stat. 799.

C. *The Construction and Constitutionality of the Organic Act of 1871*

Section 1 of the 1871 Act provided that:

> * * * all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.

Section 5 vested "legislative power and authority" in a Legislative Assembly, consisting of a Council and a House of Delegates.[12] The Act provided that "the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the provisions of this act * * *." (Section 18.)[13] The executive authority was vested in a Governor, appointed by the President with the advice and consent of the Senate. (Section 2.) Section 34 provided for an elected delegate to the House of Representatives, having the same rights and privileges as those of delegates from other federal territories.[14]

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[12] The Act provided that the members of the Council were to be appointed by the President with the advice and consent of the Senate, and that the members of the House of Delegates were to be elected by male citizens of the United States residing in the District.

[13] This comprehensive power was restricted in two respects: (1) the prohibitions upon the powers of the States contained in Article I, Section 10 of the Constitution (*i. e.*, against entering into treaties, granting letters of marque and reprisal, coining money, etc.) were made applicable to the District of Columbia; and (2) Congress reserved the right to repeal or modify all acts of the Legislative Assembly. In addition, the Act withheld from the Legislative Assembly power to legislate on specified matters such as divorce, descent, court procedure, and remission of fines. None of these is relevant to the Acts involved in the present case. 16 Stat. 419, 423.

[14] This form of government was short-lived, ending with enactment of the Temporary Organic Act of June 20, 1874, 18 Stat. 116, which substituted a temporary government of three Commissioners appointed by the President and en-

When Congress in the Organic Act of 1871 thus established a single unified government for "all that part of the territory of the United States included within the limits of the District of Columbia" (16 Stat. 419), the debates on the bill reflected an explicit recognition that it was creating a territorial government for the District patterned on other territorial governments. Cong. Globe, 41st Cong., 3d Sess., 642–644, 686–687, 1264, 1363. And both this Court and the Court of Appeals for the District of Columbia, in referring to the form of government established by the 1871

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dowed with limited executive and administrative functions. The Commissioner form of government was placed on a permanent basis by the Organic Act of June 11, 1878, 20 Stat. 102. Referring to the changes made by the 1874 and 1878 Acts, this Court said in *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 7: "Legislative powers have now ceased, and the municipal government is confined to mere administration."

The Act of January 26, 1887, 24 Stat. 368, authorized the District Commissioners to make "usual and reasonable police regulations" as to specified subjects, *e. g.*, traffic regulation, taxi fares, street-littering, etc. The Act of February 26, 1892, 27 Stat. 394, extended the Commissioner's authority to embrace "all such reasonable and usual police regulations * * * as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia." The limited scope of the Commissioners' powers, as contrasted with the broad legislative power enjoyed by the Legislative Assembly under the 1871 Act, was emphasized in *Roth* v. *District of Columbia*, 16 App. D. C. 323, 331; *Coughlin* v. *District of Columbia*, 25 App. D. C. 251, 254; *United States ex rel. Daly* v. *MacFarland*, 28 App. D. C. 552.

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Act, characterized it as a "territorial government." *Eckloff* v. *District of Columbia*, 135 U. S. 240, 241; *District of Columbia* v. *Hutton*, 143 U. S. 18, 20; *Roth* v. *District of Columbia*, 16 App. D. C. 323, 330; and see *Grant* v. *Cooke*, 7 D. C. 165, 194, 200–201.

As will appear below, the decisions of this Court establish that there is no significant difference, with regard to the power of Congress to delegate local legislative authority, between Article I, Section 8, clause 17, dealing with the District of Columbia, and Article IV, Section 3, clause 2, dealing with the other federal territories. The latter provision reads:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Under both provisions the law-making power of Congress with respect to the District of Columbia and the territories is exclusive, but only in the sense that no state can intrude upon its supreme legislative authority; under neither provision is Congress precluded from creating subordinate bodies endowed with local legislative authority.

The words "all rightful subjects of legislation" in Section 18, defining the scope of the authority delegated to the Legislative Assembly, did not originate in the Organic Act of 1871. Congress

used substantially identical language in defining the legislative powers of the territorial governments established in earlier territorial organic acts;[15] and these provisions in the various acts were codified in Section 1851 of the Revised Statutes (1873–1874) as follows: "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." And see 48 U. S. C. 77, 562, 821, and 1405r.

This Court, in construing these provisions, has held that the words "all rightful subjects of legislation" embrace all laws which are local and appropriate to territorial self-government. In *Maynard v. Hill*, 125 U. S. 190, 204, the Court took note of the essential similarity of the provisions in the organic acts defining the legislative powers of the territories, and held that what were "rightful subjects of legislation" was to be determined "by an examination of the subjects upon which

[15] Territorial Organic Acts of: *Louisiana* (March 26, 1804, 2 Stat. 283, 284); *Wisconsin* (April 20, 1836, 5 Stat. 10, 12); *Iowa* (June 12, 1838, 5 Stat. 235, 237); *Oregon* (Aug. 14, 1848, 9 Stat. 323, 325); *Minnesota* (March 3, 1849, 9 Stat. 403, 405); *New Mexico* (Sept. 9, 1850, 9 Stat. 446, 449); *Utah* (Sept. 9, 1850, 9 Stat. 453, 454); *Washington* (March 2, 1853, 10 Stat. 172, 175); *Nebraska* and *Kansas* (May 30, 1854, 10 Stat. 277, 279, 285); *Colorado* (Feb. 28, 1861, 12 Stat. 172, 174); *Dakota* (March 2, 1861, 12 Stat. 239, 241); *Arizona* (Feb. 24, 1863, 12 Stat. 664, 665); *Idaho* (March 3, 1863, 12 Stat. 808, 810); *Montana* (May 26, 1864, 13 Stat. 85, 88); *Wyoming* (July 25, 1868, 15 Stat. 178, 180).

legislatures had been in the practice of acting with the consent and approval of the people they represented." In *Cope* v. *Cope*, 137 U. S. 682, 684, the Court, referring to such a provision in the Utah Organic Act, stated that, aside from the exceptions expressly contained in that Act, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State." Accord: *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655–656.[15a] And in *Christianson* v. *King County*, 239 U. S. 356, 365, it was said that "'Rightful subjects' of legislation * * * included all those subjects upon which legislatures have been accustomed to act." See also *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 260–262.

The grant of legislative power to deal with local matters contained in the District of Columbia Organic Act of 1871 and in the other territorial organic acts, is thus "as broad and comprehensive as language could make it." *Puerto Rico* v. *Shell Co.*, *supra*, at 261. In effect, these acts constitute delegations by Congress to the territorial legis-

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[15a] In *Hornbuckle* v. *Toombs*, *supra*, the Court stated (pp. 655–656) that the "all rightful subjects of legislation" provisions entrusted the territorial legislatures "with the enactment of the entire system of *municipal* law, subject also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature * * *." (Italics added.) Compare this broad use of the word "municipal" with discussion of *Scottsburgh* opinion, pp. [illegible], *infra*.

latures of all the local legislative power that Congress can constitutionally delegate.[15b]

The power of Congress to make such delegations is indisputable. *Simms* v. *Simms*, 175 U. S. 162, 168; *Binns* v. *United States*, 194 U. S. 486, 491; *Miners' Bank* v. *Iowa*, 12 How. 1; *Christianson* v. *King County*, 239 U. S. 356, 365. In the *Simms* case the Court emphasized the breadth of the legislative authority thus delegated (175 U. S. at 168):

> In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over

[15b] When the 1871 Act was debated in Congress, both its proponents and opponents recognized the breadth of the legislative authority delegated. Representative Hoar of Massachusetts, arguing against the bill, stated that it "undertakes to establish in this District an assembly with power to make laws—with powers of legislation. * * * Under it rights of property are to be established; under it offenses are created; under it men may be sent to the penitentiary or to the gallows." (Cong. Globe, 41st Cong., 3d Sess., p. 644.) Representative Woodward of Pennsylvania, who favored the bill, countered that it "makes the District of Columbia a Territory of the Government, and, like other Territories, it will be subject to the paramount legislative power of Congress." (*Ibid.*) Another proponent of the bill, Representative Poland of Vermont, read aloud from *The Federalist*, No. 43 (see pp. 17–20, *supra*) in which, he stated, "it is declared that there is no question but what, under this clause of the Constitution, Congress has the power to delegate legislative power to a local Legislature. And Judge Story, in the third volume of his Commentaries on the Constitution, cites approvingly this declaration of the Federalist. There is therefore very weighty authority in favor of this power." (*Id.*, p. 645.)

> all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power to the legislative assembly of a Territory. * * * In the exercise of this power, Congress has enacted that (with certain restrictions not affecting this case) "the legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." * * * *The power so conferred upon a territorial assembly covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a State, are regulated by the laws of the State only.* [Italics added.]

This Court and the lower federal courts have consistently sustained the validity of territorial legislation dealing with subjects which, in a state, would ordinarily be dealt with by the state legislature. *Hornbuckle* v. *Toombs*, 18 Wall. 648 (procedural code limiting forms of action); *Maynard* v. *Hill*, 125 U. S. 190 (divorce statute); *Cope* v. *Cope*, 137 U. S. 682 (statute permitting illegitimate children to inherit); *Atchison, T. & S. F. Ry.* v. *Sowers*, 213 U. S. 55 (statute limiting tort claims); *Christianson* v. *King County*, 239 U. S. 356 (statute escheating property); *Puerto Rico* v. *Shell Co.*, 302 U. S. 253 (anti-trust statute); *People of Porto Rico* v. *American R. R. Co.*, 254 Fed. 369 (C. A. 1) (statute regulating freight

rates); *Richards* v. *Bellingham Bay Land Co.*, 54 Fed. 209 (C. A. 9) (statute abolishing dower).

It is particularly significant that several territories, acting under grants of legislative authority like that contained in the District of Columbia Organic Act of 1871, have enacted laws prohibiting racial discrimination in places of public accommodation. Alaska Compiled Laws, Section 20–1–3 (1949); Puerto Rico Laws, 1943, Act No. 131, pp. 404–407;[16] Virgin Islands, Act of September 12, 1950, Bill No. 1, 15th Legislative Assembly of Virgin Islands, 1st session.[16a] The constitutionality of such anti-discrimination legislation under the Fifth and Fourteenth Amendments is, of course, beyond question. *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 93–94, 98; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 31, 34; *Western Turf Association* v. *Greenberg*, 204 U. S. 359; *Rhone* v. *Loomis*, 74 Minn. 200; *People* v. *King*, 110 N. Y. 418.

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[16] The Puerto Rico statute has been upheld by the Supreme Court of Puerto Rico as a proper exercise of the legislative power granted to the Territory by Congress. *People of Puerto Rico* v. *Suazo*, 63 Puerto Rico Reports 869.

[16a] Laws prohibiting discrimination in public employment have been enacted in Hawaii (Revised Laws, 1945, ch. 2, sec. 75 (b), as added by 1951 Series A–2, Act 319, and sec. 123, 1951 Series A–3) and Puerto Rico (Act No. 345, Laws of 1947, secs. 14, 31 (b), 36 (a)); and laws prohibiting discrimination in public educational institutions have been enacted in Alaska (Compiled Laws, 1949, sec. 37–10–24); Hawaii (Revised Laws, 1945, ch. 34, sec. 1941); and Puerto Rico (cf. Constitution, 1952, Art. II, sec. 1; Act No. 135, Laws of 1942, secs. 15, 25).

If Congress sees fit to do so, the Constitution thus permits it to delegate power to the people of a territory to govern themselves and to enact local laws incident to self-government. In the past Congress has pursued the policy of delegating such local legislative power as soon as it found that a territory was ready to assume this responsibility.[17] The Constitution does not prevent Congress from treating the District of Columbia on the same basis. The Court has recognized that whether, and the extent to which, Congress should delegate authority to enact local laws in the territories, including the District of Columbia, is solely a matter of legislative policy (*Binns* v. *United States*, 194 U. S. 486, 491):

> It must be remembered that Congress, in the government of the Territories *as well as of the District of Columbia*, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. * * * *It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory.* [Italics added.]

[17] In *Clinton* v. *Englebrecht*, 13 Wall. 434, 441, the Court noted that the Congressional policy underlying the broad grants of legislative authority to the territories "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority * * *."

D. *The distinction between "general" and "municipal" subjects of legislation is inapplicable here*

Nothing in the Constitution, or in the decisions of this Court interpreting it, supports the notion that the constitutional power of Congress to delegate local legislative authority to the District of Columbia is limited by a vague and ambiguous [17a] distinction between "general legislation" and "municipal regulations." That distinction evolved in the law of municipal corporations governing the powers of ordinary municipalities within a state. Even in that context, it does not forbid a state, if it chooses to do so, to delegate to a municipality authority to enact local ordinances dealing with a "general" subject-matter. (*Infra*, pp. 43–46.)

The majority judges of the Court of Appeals held, however, that Congress cannot grant authority to enact "general legislation"; that its delegatory authority is restricted to "municipal regulations and ordinances"; and that "general legislation" includes enactments which "are in the nature of civil rights legislation," or which restrict freedom of contract, use of property, or carrying on a lawful calling. See pp. 5–7, *supra*. This test of delegability, if accepted, would appear to preclude even a grant of authority to enact ordinances dealing with such clearly local

[17a] See footnote 8a, *supra*.

matters as land zoning, regulation of building construction, public health regulation, etc. All of these limit freedom of contract, use of property, and the exercise of a lawful calling, but it could not be seriously contended that they are for that reason beyond the power of local governments. *Breard* v. *Alexandria*, 341 U. S. 622, 629–633; *Euclid* v. *Amber Realty Co.*, 272 U. S. 365, 388–395; *Faitoute Co.* v. *Asbury Park*, 316 U. S. 502, 509–516; *Railway Express* v. *New York*, 336 U. S. 106; *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 82–84.

Furthermore, the distinction between "general legislation" and "municipal regulations" has no relevance in defining the power of Congress to delegate legislative authority to the District of Columbia. See Note, 21 Geo. Wash. L. Rev. 337, 348. The distinction derives from the law of municipal corporations applicable to municipalities within a state. In a state, legislation of a municipality may possibly encroach upon powers reserved to the state legislature or interfere with the rights of other municipalities. Some matters, like the law of domestic relations and of wills and inheritance, are usually regarded as of state-wide concern and as calling for uniform state-wide treatment, unless authority to deal with them is expressly delegated to municipalities. In the law of municipal corporations these are described as the subjects of "general legislation." On the other hand, matters which

may appropriately be dealt with on a local basis by a municipality, in the absence of overriding state law to the contrary, are regarded as proper subjects of "municipal regulations." McQuillin, *Municipal Corporations* (3d ed. 1949), secs. 4.85, 15.18–15.19, 15.30, 16.04–16.09, 23.03–23.05; Dillon, *Municipal Corporations* (5th ed. 1911), secs. 537, 630–632.[18]

The geographical factors which have led state courts to draw the distinction between "general legislation" and "municipal regulations" do not exist in the District of Columbia. In the District the powers of local government are geographically coextensive with the entire area of the territory. In this crucial respect it is totally unlike the ordinary municipality within a state, and like a territory it combines elements both of a city and state. Congress itself described the District of Columbia, in the Act of July 16, 1790, 1 Stat. 130, establishing the District as the

[18] As has been noted (footnote 13, *supra*), the Organic Act of 1871 expressly withheld from the Legislative Assembly of the District the power to deal with certain specified subjects. Section 17 contained a list of laws which could not be enacted by the Legislative Assembly. Among these were laws for granting divorces; changing the law of descent; and affecting the sale or mortgage of real estate belonging to minors. This enumeration of forbidden subjects of local legislation did not include "civil rights" or "anti-discrimination" laws. By plain implication, these were included within the residual category of "all rightful subjects of legislation" upon which the Assembly was empowered to act.

permanent seat of the government of the United States, as a "district of territory." This Court has said: "The District of Columbia is an exceptional community. It is not a local municipal authority, but was established under the Constitution as the seat of the National Government." *District of Columbia* v. *Murphy*, 314 U. S. 441, 452. In *Grether* v. *Wright*, 75 Fed. 742, 757 (C. A. 6), Circuit Judge Taft characterized the District as "the city, not of a state, not of a district, but of a nation." And, in similar recognition that the District is not comparable to an ordinary city in a state, the Court has said "that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State" to which Congress can grant "subordinate legislative powers of a municipal character * * *". *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 9.[18a]

To be sure, there was a time, prior to 1871, when the District of Columbia comprised more than one municipality (*supra*, pp. 21–22); at that time an analogy to the law of municipal corporations applicable in the states might have been relevant in determining the powers of each such municipality. But there could certainly have been no doubt then that the territory comprising such municipalities, *i. e.*, the entire District of

[18a] As to the meaning of "municipal" in this context, compare *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655, quoted in footnote 15a, *infra*, and see discussion, pp. 38–40, *supra*.

Columbia area, was—so far as the power of Congress to delegate legislative authority was concerned—a territory and not an ordinary municipality. See Act of July 16, 1790, 1 Stat. 130. Obviously, the consolidation in 1871 of these municipalities into a single unified government for the District of Columbia did not alter its constitutional status, or diminish the power of Congress in relation to it.

In the District of Columbia, as it was constituted by the Act of 1871 and as it exists today, there can be no problem of conflicting laws enacted by different municipalities within the District.[19] The opinion in *Roach* v. *Van Riswick*, MacArthur & Mackey 171, which is quoted in the opinion of Chief Judge Stephens (R. 70–71), itself shows that the distinction between "general" and "municipal" legislation which the court applied was based upon the fact, no longer true since 1871, that the District of Columbia was in its inception composed of several municipalities and was not, as now, a single unified government (pp. 178–179):

> There might be twenty municipalities in one State. * * * It would never do to

[19] Laws passed by the Legislative Assembly defining "general" crimes have been upheld, *United States* v. *May*, 2 MacArthur 512 (abortion), notwithstanding that a municipal ordinance of such a nature, if enacted by a city within a state, might possibly be regarded as "general legislation" reserved, unless expressly delegated, as a subject for statewide legislation.

have different rules of property, different laws of contract generally, or of commercial paper in particular, different legal proceedings and remedies, and different criminal codes in the different municipalities of a State. It is very plain that the disposition of these subjects by law is the exercise of legislative power, and that, when that is constitutionally vested in a definite legislative body, it cannot, in the nature of things, be delegated to another. The power of making laws derived directly from the people is legislative; the power of local regulation derived from the legislature is municipal, no matter how limited or extensive the locality embraced by it.

These conclusions will apply to the Congress of the United States, even if we regard it as a mere local legislature, in its relations with the District of Columbia. When it assumed jurisdiction over the District, it found two corporations, Alexandria and Georgetown, in existence, and a few years later it created a third, the city of Washington. Each one of those corporations had a charter, and all the charters differed more or less in detail, while the general features of municipal charters were common to all. It would have been preposterous for Congress to have committed to each the power of regulating or ordaining legal proceedings and remedies, establishing the law of contracts, &c., within their respective corporate limits. Three or four different systems of law

> would have prevailed, the creatures of municipal action; and great confusion and perhaps conflict would have prevailed.[19a]

Relying upon the *Roach* case, *inter alia*, the majority judges in the court below, without examining the considerations which differentiate the District of Columbia from an ordinary municipality within a state, and which make inapplicable the distinction between "general legislation" and "municipal regulations," assumed its applicability as a constitutional limitation on the powers of Congress in relation to the District of Columbia. The case in this Court upon which they principally relied is *Stoutenburgh* v. *Hennick*, 129 U. S. 141. But that case held only that the Legislative Assembly had no power to enact a law restricting commerce with persons outside the District, and that the regulation of interstate commerce rested within the exclusive power of Congress.

True, the Court's opinion in the *Stoutenburgh* case stated that Congress "could only authorize it [the District of Columbia] to exercise munic-

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[19a] The *Roach* opinion also stated (p. 176) that "municipal regulation * * * is universally recognized as something distinct from the exercise of legislation, which is invested by the Constitution of a state in its legislature, and cannot be delegated." But this Court has, in cases too numerous for citation, repeatedly held that a municipal ordinance is as much an exercise of legislative power as a state law. See e. g., *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148, and cases cited.

ipal powers * * *" (p. 147). There is no reason to assume, however, that the word "municipal," as used by Mr. Chief Justice Fuller in that opinion written in 1889, was necessarily used in the narrow, restricted sense which the judges below attributed to it. The word "municipal" was frequently used, particularly by jurists and text-writers in the last century, in the broad sense of "internal" or "domestic," as distinguished from "foreign" or "international."[20] Moreover, the preceding paragraph of the *Stoutenburgh* opinion leaves no doubt as to what was meant by "municipal powers":

> It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities

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[20] Webster gives, as a common meaning of the word, "pertaining to the internal or governmental affairs of a state, kingdom, or nation" (*International Dictionary*, 2d ed. 1948, p. 1611). The Oxford English Dictionary's first definition is "Pertaining to the internal affairs of a state as distinguished from its foreign relations. Originally and still chiefly in the phrase *municipal law*, the law of a particular state, as distinguished from international law or the law of nations. So *municipal rights, jurisdiction, etc.*" Its second definition is "Pertaining to the local self-government or corporate government of a city or town. In common use only from the 19th c." (Murray ed. 1908, vol. 6, p. 767.)

"Municipal law" was used in such a broad sense in *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655 (1874), quoted in foot-

> exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

In its context, therefore, the statement that "general affairs" shall be managed "by the central authority" means simply that national matters, such as regulating interstate commerce, declaring war, raising armies, establishing uniform rules of naturalization, etc., are to be dealt with by Congress on a national basis, and not by a local legislature in the District on a local basis. The Court, in the same sentence, reiterated the "cardinal principle of our system of government,

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note 15a, *supra*. In *City of New York* v. *Miln*, 11 Pet. 102, 139 (1837), the Court referred to "all those powers [of a state] which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police* * * *." See also *United States* v. *Cruikshank*, 92 U. S. 542, 553 (1875).

Compare *Chicago & Pac. Ry. Co.* v. *McGlinn*, 114 U. S. 542, 546 (1885). "* * * municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign." The *McGlinn* case held a statute of Kansas imposing liability on railroads for the destruction of cattle to be "of a municipal character." See also *Steele* v. *Halligan*, 229 Fed. 1011, 1018 (W. D. Wash. 1916): "* * * the municipal law of the old sovereignty [referring to a state] regulating civil rights * * *."

that local affairs shall be managed by local authorities * * *." It neither stated nor implied that there existed a class of "local affairs of a general nature" which could not constitutionally be delegated to local authorities.

Metropolitan Railroad v. *District of Columbia*, 132 U. S. 1, the only other decision of this Court cited in Chief Judge Stephens' opinion, held only that under the Act of June 11, 1878 (20 Stat. 102), the District of Columbia had a right to bring suit in its own name. That right was expressly granted by the 1871 Organic Act, and the Court construed the 1878 Act as also giving the District such right. Apart from the fact that it is only remotely related to the problem here involved, that case dealt with the District of Columbia as constituted under the Organic Act of 1878 (see footnote 14, *supra*).

None of the decisions of the lower District of Columbia courts cited in the opinions below, apart from *Roach* v. *Van Riswiek*, *supra*, furnishes support for the asserted restriction on the power of Congress to delegate local legislative authority. *Coughlin* v. *District of Columbia*, 25 App. D. C. 251, and *United States ex rel. Daly* v. *MacFarland*, 28 App. D. C. 552, dealt respectively with an ordinance of the District Commissioners requiring property owners to remove snow from the streets and with the power of the Commissioners to impose the penalty of forfeiture of a license. Both involved definition of the scope of the nar-

row executive and administrative powers of the Commissioners under the form of government established in 1878. The Commissioners' powers are, of course, primarily executive and administrative, not at all comparable to the legislative powers granted to the Legislative Assembly under the 1871 Act. (See footnote 14, *supra*.) In the *Coughlin* case the court stressed that authority of the Commissioners under the Acts of 1887 and 1892 was limited to promulgation of "reasonable and usual police regulations." Under these Acts, the court stated (p. 254), "it is regulation, not legislation, that is authorized; * * *. The commissioners are not the municipality, but only the executive organs of it; and Congress has reserved to itself, not only the power of legislation in the strict sense of the term * * *, but even the power of enacting municipal ordinances, such as are within the ordinary scope of the authority of incorporated municipalities."

District of Columbia v. *Saville*, 1 MacArthur 581, which held invalid an act of the Legislative Assembly regulating sales of theatre tickets, and *Smith* v. *Olcott*, 19 App. D. C. 61, which held invalid an act of the same body regulating the fees of auctioneers, were plainly based on the view that such regulations were outside the scope of the police power—that is, that they would be invalid even if enacted by Congress or by a state legislature. This restricted view of the police power has been discredited since *Nebbia* v. *New*

York, 291 U. S. 502, and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. *United States* v. *Cella*, 37 App. D. C. 433, dealt only with the question whether a prosecution for violation of an act of Congress prohibiting "bucket shops" could be brought in the name of the District of Columbia under the statute providing for District prosecution for violation of ordinances in the nature of police or municipal regulations (see footnote 42, *infra*).

E. *The Acts of 1872 and 1873 would be valid even if enacted by a municipality within a state, having only ordinary municipal powers*

This Court has held in many cases (*supra*, p. 17) that Congress in dealing with the District of Columbia has all the powers possessed by a state in dealing with one of its municipalities. A state unquestionably can delegate authority to a municipality to enact local legislation designed to solve problems arising from racial discrimination. The extent to which a state can delegate its powers to a municipal government is a matter for its own determination; the state has "unrestrained power * * * over political subdivisions of its own creation." *Faitoute Co.* v. *Asbury Park*, 316 U. S. 502, 510; *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178–179; *Barnes* v. *District of Columbia*, 91 U. S. 540, 544; *Schieffelin* v. *Hylan*, 236 N. Y. 254, 260–261; *Milwaukee* v. *Raulf*, 164 Wis. 172, 183; *Duluth* v. *Cer-*

veny, 218 Minn. 511, 515. In the *Barnes* case this Court said (p. 544): "A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality." Accord: *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 8.[20a]

[20a] The constitutions of many states contain provisions for "home rule" of larger cities, and under such provisions the laws of the cities prevail over state laws, with respect to local matters. *Adler* v. *Deegan*, 251 N. Y. 467; *Dickinson* v. *Tidd*, 137 F. 2d 610, 612 (C. A. 10); McQuillin, *Municipal Corporations* (3d ed. 1949), secs. 4.83, 15.30. The provisions of the constitution of the State of New York (1938) are typical. Article 9, Section 11, provides: "The legislature may by general laws confer on cities such powers of local legislation and administration * * * as it may, from time to time, deem expedient and may withdraw such powers." Article 9, Section 12, provides: "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs, or government. Every city shall also have the power to adopt and amend local laws not inconsistent with the constitution and laws of the state, and whether or not such local laws relate to its property, affairs, or government, in respect to the following subjects: * * * the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health." Pursuant to these provisions the New York legislature has enacted a "City Home Rule Law" (McKinney's Consolidated Laws, Book 7-A). In *People* v. *Lewis*, 295 N. Y. 42, 49, it was held that these constitutional and statutory provisions gave New York City "broad legislative power to provide by local law for the preservation and promotion of the health, safety and general welfare of its inhabitants," and hence a local price and rent control law, not inconsistent with state or federal law, was valid.

Except as limited by state constitutional or statutory prohibitions, express or implied, the delegated power of municipalities to enact regulatory ordinances is as broad as the police power of a state. *City of Phoenix* v. *Michael*, 61 Ariz. 238, 243; *Shepherd* v. *McElwee*, 304 Ky. 695, 698; *People* v. *Sell*, 310 Mich. 305, 315; *Schultz* v. *State*, 112 Md. 211, 215–218; McQuillin, *Municipal Corporations* (3d ed. 1949), secs. 16.04–16.09. The constitutionality of anti-discrimination legistion, as a proper exercise of the police power, is settled. *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 93–94, 98; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 31, 34; *Western Turf Association* v. *Greenberg*, 204 U. S. 359; *Rhone* v. *Loomis*, 74 Minn. 200; *People* v. *King*, 110 N. Y. 418. And, as is shown below (pp. 47–51, *infra*), municipal governments throughout the country, acting within the orbit of authority delegated by their states, have enacted ordinances dealing with racial discrimination in public places. It would be strange indeed if Congress, which has been held to have "complete sovereignty" over the District (*S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 562, and see other cases cited *supra*, p. 17), were denied a power to delegate local legislative authority which is so commonly exercised by the states.

However, even if, contrary to our argument as to the breadth of the power constitutionally

delegated by Congress to the District of Columbia by the Organic Act of 1871, the latter Act should be narrowly construed as granting the Legislative Assembly only the ordinary, conventional powers of a municipal corporation within a state, the Acts of 1872 and 1873 would still be valid. This argument formed the principal basis of Judge Fahy's dissenting opinion in the Court of Appeals, and it would serve no useful purpose to repeat here in detail the wealth of supporting authorities collected in that opinion.

The regulation of service in restaurants and other places of public accommodation is traditionally regarded as a proper subject of local concern. See, *e. g., Cooper* v. *District of Columbia,* MacArthur & Mackey 250, 259, 260. If a municipality can regulate a restaurant's sanitary conditions, in the interest of the public health; if it can regulate the construction of its building, its seating arrangements, and the number of its patrons, in the interest of the public safety; then surely it can regulate or prohibit, in the interest of the public welfare, any discrimination in service on account of race or color. An anti-discrimination regulation is not essentially different from these other types of regulation. All of them affect the rights and duties of a restaurant owner; all limit his freedom of contract and his use of property. In each case, however, only local regulation is involved. Cf. *Euclid* v. *Amber Realty Co.*, 272

U. S. 365, 388–395; *Breard* v. *Alexandria*, 341 U. S. 622, 629–633; *Kovacs* v. *Cooper*, 336 U. S. 77, 83 (opinion of Reed, J.); *Railway Express* v. *New York*, 336 U. S. 106; *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 82–84.

Moreover, as is abundantly demonstrated in the dissenting opinion of Judge Fahy, municipal governments throughout the country have exercised the power to enact ordinances dealing with racial discrimination in public places. Many of these prohibit racial segregation; others require segregation.

Many local ordinances prohibit racial and religious discrimination in employment;[21] in pub-

[21] *Arizona:* Phoenix Ordinance No. 4810, April 27, 1948; *California:* Richmond, Ordinance No. 1303, May 16, 1949; *Iowa:* Sioux City, Ordinance No. Q–34826, February 23, 1951, published March 6, 1951; *Illinois:* Chicago, August 21, 1945; *Indiana:* East Chicago, Ordinance No. 2526, March 12, 1951; Gary, Section 25, Chapter 18 (Municipal Code), November 20, 1950; *Michigan:* River Rouge, November 4, 1952; Pontiac, Ordinance No. 1196, November 18, 1952; *Minnesota:* Minneapolis, January 31, 1947, effective February 5, 1947, amended October 29, 1948, May 25, 1951; *Ohio:* Akron, April 10, 1951; Campbell, October 19, 1950; Cincinnati, Ordinance No. 196–1946, June 5, 1946; Cleveland, Ordinance No. 1579–48, January 30, 1950; Girard, Ordinance No. 2031, September 25, 1951; Hubbard, December 1950; Lorain, Ordinance No. 6495, October 2, 1951; Lowellville, March 14, 1951; Niles, Ordinance No. 7014, May 17, 1951; Steubenville, Ordinance No. 7856, April 16, 1951; Struthers, October 5, 1950; Warren, Ordinance No. 4018–51, February 19, 1951; Youngstown, Ordinance No. 51948, May 16, 1950; *Pennsylvania:* Farrell, 1951; Monessen, Ordinance No. 345, December 13, 1950; Philadelphia, Journal of City of Philadelphia, App. III, pp.

lic housing;[22] and in places of public accommodation.[23] There are also many local ordinances

179–185, March 12, 1948; Pittsburgh, Ordinance No. 465, December 1, 1952; Sharon, May 8, 1951; *Wisconsin:* Milwaukee, Ordinance No. 22, Secs. 106–24 *et seq.*, Milwaukee Code, May 13, 1946.

[22] *California:* Los Angeles, Ordinance No. 97536, January 12, 1951; Los Angeles, Resolution of Bd. of Supervisors, Los Angeles County, July 3, 1951; San Francisco, Resolution No. 8660 of Bd. of Supervisors, May 17, 1949; *Connecticut:* Hartford, Resolution of Court of Common Council, January 24, 1949; *Massachusetts:* Boston, Resolution, City Council, June 28, 1948; *Michigan:* Pontiac, Resolution, Public Housing, Pontiac Housing Commission, No. 76, November 19, 1951; *Minnesota:* St. Paul, Resolution, Public Housing Redevelopment Authority, April 1950; *Nebraska:* Omaha, Resolution, Omaha Housing Authority, November 9, 1951; *New Jersey:* Newark, Resolution, Newark Housing Authority, September 14, 1950; *New York:* New York, Ordinance No. 20, Title J, Article A, July 3, 1944; New York, Adm. Code of N. Y. C., Sec. 384–16.0, December 23, 1949; New York, N. Y. C. Local Law No. 41, March 14, 1951; *North Carolina:* Charlotte, January 1950; *Ohio:* Cincinnati, Declaration of Urban Redevelopment Policy, City Council, September 5, 1951; Cleveland, Ordinance No. 2139–49, December 21, 1949; Toledo, Resolution, Public Housing Metropolitan Housing Authority, December 4, 1952; Toledo, Ordinance, Public Housing, City Council No. 738–51, November 14, 1951; *Pennsylvania:* Allegheny County, Resolution, Public Housing Allegheny County Housing Authority, December 30, 1952; Philadelphia, Resolution, Public Housing, Philadelphia Housing Authority, No. 3630, May 26, 1952; Pittsburgh, Resolution, Public Housing, Housing Authority of City of Pittsburgh, December 18, 1952; *Rhode Island:* Providence, Resolution, City Council, No. 724, October 10, 1950; *Washington:* Pasco, Resolution No. 114, Pub. Housing Authority, May 24, 1951.

[23] *Florida:* Miami Beach, Ordinance No. 883, June 15, 1949; Surfside, Ordinance No. 190, April 9, 1950; *California:* Bakersfield, February 14, 1950; Los Angeles, Ordinance No.

which establish commissions working for improvement of inter-racial relations.[24] The significance of this widespread practice is, as Judge Fahy pointed out, persuasive in determining the validity of such regulation in a field in which "there is no rule of thumb by which to determine whether a regulation is local or constitutes general legislation beyond municipal competence" (R. 105).[25]

No less persuasive is the prevalence of ordinances requiring segregation, for these, apart from the question of their validity under the

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77000, Art. 6, Ch. 4, Sec. 46.01, February 14, 1950; *New Mexico:* Albuquerque, Ordinance No. 768, February 12, 1952; *Ohio:* Cleveland, Ordinance No. 101–637; Sec. 2999–1 Municipal Code of Cleveland, November 26, 1934, Ordinance No. 223–46, February 17, 1947.

[24] *California:* Los Angeles, January 11, 1944; *Colorado:* Denver, Ordinance No. 11, January 31, 1951; *Illinois:* Chicago, December 12, 1947; *Indiana:* Evansville, March 2, 1948; Indianapolis, Ordinance No. 9, February 16, 1953; Fort Wayne, July 22, 1952; *Michigan:* Detroit, April 7, 1953; Jackson, Ordinance No. 211, November 9, 1948; *Missouri:* Kansas City, November 14, 1951; St. Louis, January 13, 1950; *New Jersey:* Paterson, 1949; *New York:* Buffalo, Ch. 96 of 1945 Ordinances, August 1, 1945; *Ohio:* Akron, September 8, 1949; Cincinnati, November 17, 1943; Cleveland, Ordinance No. 240–15, adding Secs. 71–1 to 71–4 to the Municipal Code of 1924, March 13, 1945; Toledo, Ordinance No. 229–46, July 6, 1946; *Oregon:* Portland, Ordinance No. 91286, March 9, 1950; *Pennsylvania:* Pittsburgh, December 17, 1946.

[25] But cf. *Nance* v. *Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773. This case, however, held no more than that the legislature had not, as a matter of construction, delegated to the city power to enact an anti-discrimination law.

Fifth and Fourteenth Amendments,[26] have frequently been upheld by the courts of many states as valid municipal regulations.[27] These ordinances, moreover, pertain specifically to a variety of public accommodations, including restaurants.[28] Chief Judge Stephens' opinion sought to distinguish such cases on the ground that the ordinances there sustained "were in accord with a local custom of racial segregation on account of color and were held valid upon the theory that they were for the purpose of preserving peace and

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[26] As the Court is aware, it is the position of the United States that racial segregation enforced or supported by law is unconstitutional. See briefs for the United States in the "school segregation" cases now pending before the Court (Nos. 8, 101, 191, 413, 448) and in *Henderson* v. *United States*, 339 U. S. 816; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

[27] See *e. g.*, *Boyer* v. *Garrett*, 183 F. 2d 582 (C. A. 4); *Patterson* v. *Taylor*, 51 Fla. 275, 40 So. 493; *Crooms* v. *Schad*, 51 Fla. 168, 40 So. 497; *Mayo* v. *James*, 73 Va. 17; *Hopkins* v. *City of Richmond*, 117 Va. 692, 86 S. E. 139; *Roberts* v. *Boston*, 5 Cush. 198 (Mass.); *Housing Authority* v. *Higginbotham*, 143 S. W. 2d 95 (Tex. Civ. App.); *Bunn* v. *City of Atlanta*, 67 Ga. App. 147, 19 S. E. 2d 553.

[28] A. In places of public accommodation: *Alabama:* Birmingham, Secs. 369, 597, 859, 959, 1110, and 1111, General City Code (1944); *Georgia:* Atlanta, Secs. 37–129, 43–302, 53–603–606, 66–1005, 68–126, 55–217, Code (1942).

B. Transportation: *Alabama:* Birmingham, Secs. 1002, 1413, General City Code (1944) Mobile, Chap. 20, Art. 1, Secs. 224–230, Code of Ordinances, May 6, 1947; *Florida:* Jacksonville, Ordinance No. T–215, approved March 4, 1929; *Georgia:* Atlanta, Secs. 62–121, 85–138, Code (1942); *Texas:* Dallas, Arts. 76–22, 77–14, 136–1 *et seq.*, Dallas City Code (1941); Houston, Secs. 2207–2216, City Code (1942).

good order which would likely be interfered with by racial association." On the other hand, he stated, the "enactments involved in the instant case were in conflict with local custom in respect of race association and cannot therefore be justified as in aid of the preservation of peace and order" (R. 83). We think that the attempted distinction fails, for several reasons.

First, the constitutional power of a municipality to enact a law does not depend upon whether or not the legislation accords with local custom. We agree with Judge Fahy that "there is no doctrine known to the law that validity or invalidity of legislation rests upon whether or not it conforms with prevailing custom" (R. 108). Chief Judge Stephens assumed it to be a fact, so clear that a court could take judicial notice of it, that "there was general discrimination on account of color at the time the enactments in question in the instant case were passed" (R. 81). We question the validity of this assumption. Evidently the custom was not so widespread as to make the electorate unwilling to vote for a legislature which enacted the 1872 and 1873 laws. The assumption overlooks, moreover, the well-known civil rights sentiment prevalent in many quarters during the Reconstruction period. The District of Columbia points out in its brief here that, in the decade preceding enactment of these laws by the Legislative Assembly, Congress abol-

ished slavery in the District of Columbia (Act of April 16, 1862, 12 Stat. 376); granted Negroes the right to vote in any election in the District (Act of January 8, 1867, 14 Stat. 375); made Negroes amenable to the same laws as white persons (Act of May 21, 1862, 12 Stat. 407); gave Negroes the right to ride on street cars in the District (Act of March 3, 1865, 13 Stat. 536); and proposed the Thirteenth, Fourteenth, and Fifteenth Amendments. Moreover, the council of the city of Washington enacted ordinances in 1869 and 1870 which made it unlawful for proprietors of restaurants, theatres, and other specified establishments to refuse service to any orderly person because of his race or color. (See R. 84, footnote, and R. 105–107.)

The validity of an ordinance as a proper exercise of municipal authority does not depend on a showing that its purpose and effect are to preserve peace and order. From time immemorial local governments have had to make laws dealing with all matters of community concern, including health, safety, education, and welfare. Cf *Euclid* v. *Amber Realty Co.*, 272 U. S. 365, 388–395. Preservation of peace and order is a proper, but not the exclusive, concern of a municipality.[29]

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[29] McQuillin, *Municipal Corporations* (3d ed. 1949) § 24.198, summarizes the proper subjects of municipal regulation as follows: "Such [municipal] regulation constitutes a proper exercise of the police power where it is reasonably related to the promotion or protection of the public morals

But even if the rule were otherwise, we think that a legislative judgment that an anti-discrimination ordinance tends to alleviate inter-racial tension and to reduce the threat of violence is rational and should be respected by the courts in passing upon the validity of an exercise of municipal power. Obviously, the fact that certain non-law-abiding elements might resort to violence in resisting a measure they disapprove cannot establish its invalidity as beyond the limits of municipal power. If Chief Judge Stephens' opinion means that the validity of an ordinance depends upon whether it is in accord with "local custom" as judicially noticed by a court, it would follow that the more pervasive and noxious a local evil is, the less would be the power of a municipality to deal with it: a municipal law

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and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health, or otherwise to the advancement of the public welfare and interest." (The last clause is omitted from the quotation at R. 81.) Summarizing the countless cases on this subject, McQuillin states (§ 24.13) that "courts accord a wide discretion to municipal authorities in the exercise of police power. They have sustained its exercise for purposes more or less indefinite, e. g., the promotion of the 'general interest,' 'general prosperity,' 'general well-being,' 'public welfare' and 'public convenience' of the community, apart from any question of public health, safety or morals." And see cases cited *supra*, pp. 11-15, holding that municipal police power is as broad as the state's.

would be invalid if a court finds it in conflict with "local custom," no matter how deplorable such custom is and how strongly the community desires to alter it.

II

THE ACTS OF 1872 AND 1873 HAVE NOT BEEN REPEALED

In the court below, the four judges who concurred in the opinion of Chief Judge Stephens held, as an alternative ground of decision, that the 1872 and 1873 Acts, being "general legislation", were repealed by Congress when it enacted the District of Columbia Code of 1901 (31 Stat. 1189). Judge Prettyman agreed that if the 1872 and 1873 Acts were "general", they were repealed by the 1901 Code. He expressed the further view, in which only Judge Miller joined (R. 100), that if the Acts were "regulatory municipal ordinances," they were within the power of the present District Commissioners to repeal and hence were abandoned and impliedly repealed by the long failure of the Commissioners to enforce them.

We think that neither of these grounds relied on in the court below as establishing repeal of the Acts has merit. It should be noted, at the outset, that in the Organic Act of 1878 (20 Stat. 102), establishing the present Commissioner form of government, Congress expressly provided that

"all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect." Congress thereby, in effect, ratified the Acts of 1872 and 1873 enacted by the Legislative Assembly, and gave them as much status and force as if they had been enacted by Congress itself.

A. *The 1901 Code*

Section 1636 of the 1901 Code is set out in the footnote.[30]

[30] "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except:

"First. Acts and parts of acts relating to the rights, powers, duties, or obligations of the United States.

"Second. Acts and parts of acts relating to the Court of Claims.

"Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

"Fourth. Acts and parts of acts relating to the militia.

"Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

"Sixth. Acts and parts of acts of Congress relating solely to the Departments of the General Government in the District of Columbia, or any of them.

The section has two parts, the first a general repealer clause, and the second, comprising a list of eight groups of exceptions and the last paragraph, a saving and reenacting provision. If a

"Seventh. Acts or parts of acts authorizing, defining, and prescribing the organization, powers, duties, fees, and emoluments of the register of wills of the District of Columbia and his office.

"Eighth. An act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; an act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health.

"All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code."

statute falls within the first part of the section, it is repealed unless it comes within one of the saving exceptions. In the court below it seems to have been assumed that the 1872 and 1873 Acts came within the first part of Section 1636. The disagreement related primarily to whether the Acts fell within one of the saving provisions of Section 1636, or within Section 1640, set out below.

Our position is different. We reject any assumption that the 1872 and 1873 Acts were covered by the general repealer clause of Section 1636. The origin, history, purpose, and terms of the Code abundantly demonstrate that it was never intended to repeal enactments of the Legislative Assembly, like the 1872 and 1873 Acts, which were appropriate for inclusion in Part II of the original draft of the Code—the part which was not enacted by Congress. It is pertinent in this connection to emphasize the settled rule of construction that "repeals by implication are not favored" and that the "intention of the legislature to repeal 'must be clear and manifest.'" *United States* v. *Borden Co.*, 308 U. S. 188, 198–199, and cases there cited.

Even if the court below was correct, however, in assuming that the Acts were covered by the general repealer clause of Section 1636, we think it erred in holding that they were not saved by the second part of that section. We believe that

these Acts fall within the third and fifth exceptions, which saved acts of the Legislative Assembly relating to "police regulations" or "to municipal affairs," or were "penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." Finally, we urge that the Acts are embraced within the separate saving provision of Section 1640, which reads:

> Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of * * * any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.

The reasons for our views lie, initially, in the genesis and purposes of the Code.

1. *History and Scope of the Code* [31]

a. The 1901 Code, as enacted by Congress, originated in a draft code prepared over a period of years by Judge Walter S. Cox, an Associate Justice of the Supreme Court of the District of Columbia. Judge Cox acted in response to a joint request by the Washington Board of Trade and

[31] The historical material contained in this portion of the brief was largely obtained from the following sources: H. Rep. No. 1017, 56th Cong., 1st Sess., pp. 4–6; Cox, *Code of Law for the District of Columbia* (1898) pp. vii-xiv; Historical Introduction, District of Columbia Code (1951 ed.) pp. ix-xiv, as well as other sources specifically cited.

the District bar association. See 5 Repts. Wash. Bd. of Tr. 16 (1895); 8 *id.* 22–26 (1898). The bar and the Board of Trade were moved by dissatisfaction with the scattered sources of statutory and judge-made law in the District of Columbia, in which there were recognized at least five separate sources of law:

(1) The common law and principles of equity. In respect to the District of Columbia the particular application of the common law had to be found in and formulated from the common law of England (including equitable principles) as it was received by the courts of Maryland, to the extent that it was not "locally inapplicable," and from the decisions of the Maryland courts until 1801. The basis for their application to the District was the Organic Act of 1801 (2 Stat. 103), which provided "that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted * * *."[32]

(2) British statutes enacted before 1787, if not "locally inapplicable." These were incorporated partly because of the widely accepted principle that such British acts, up to an indeterminate

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[32] A parallel provision applied Virginia law to that part of the District known as Alexandria County, west of the Potomac River, which was ceded by Virginia. This portion was retroceded to Virginia by the Act of July 9, 1846, 9 Stat. 35. (See pp. 23, *supra*.)

time between the settlement of the colonies and the Declaration of Independence became part of the common law and partly because some such acts applied as colonial statutes in the colony of Maryland and remained in force there after 1776.

(3) Acts of the General Assembly of Maryland before 1801. These also applied by virtue of the Organic Act of 1801.

(4) Acts of Congress applicable solely to the District, and those of a general nature not locally inapplicable in the District.

(5) Acts of the Legislative Assembly of the District of Columbia enacted during the three years of its existence.

When the Board of Trade and the bar association asked Judge Cox to draft a code, there was no single legislatively-enacted official compilation or codification of these scattered and sometimes obscure sources, although a number of unsuccessful attempts to obtain one had been made over many years.[33] Judge Cox undertook a com-

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[33] The only official codification was the Revised Statutes of the District of Columbia, which contained all Acts of Congress expressly applicable to the District. Act of June 20, 1874, c. 333, 18 Stat. 113. The unsuccessful attempts to secure enactment of compilations or codifications of all applicable statute law are listed and described in the Historical Introduction to the District of Columbia Code (1951 ed), pp. ix-x, as follows:

"1. Code of Laws for the District of Columbia: prepared under the authority of the Act of Congress of the 29th of

plete revision and modernization of the statutory law of the District. His original purpose was to replace all the existing statute law by a new code in which he "treated every subject provided for by it, except such matters as were of a transitory

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April, 1816. Preface signed by W. Cranch, November 19, 1818. Washington 1819, 575 pages.

"This code was obviously designed for enactment by Congress, but no official action was taken with respect to it. It is drawn from old British statutes and acts of Maryland and Virginia, as well as from acts of Congress relating to the District of Columbia; it apparently includes all subjects of legislation except provisions relating to the municipal government of Washington, etc.

"2. The Acts of Congress, in relation to the District of Columbia, 1790–1831, and of the Legislatures of Virginia and Maryland, passed especially in regard to that District. By William A. Davis. Washington City, 1831, 375 pages.

"This is merely an unofficial compilation of separate acts, with no attempt at arrangement by subject.

"3. The Revised Code of the District of Columbia, prepared under the authority of the Act of Congress * * * approved March 3, 1855. Preface signed by Robt. Ould and Wm. B. B. Cross, November, 1857. Washington, 1857, 699 pages.

"The act of March 3, 1855 (10 Stat. 642–643), provided for a vote by the people of the District of Columbia as to the adoption of the code as published. The vote was adverse, according to Wilhelmus Bogart Bryan, in his History of the National Capital (v. 2, p. 439).

"4. An Analytical Digest of the Laws of the District of Columbia. By M. Thompson. Washington City, 1863. 454 pages.

"This digest is entirely unofficial. It aims to give all the law in force, with a few annotations. It is not clear whether the laws have been copied verbatim, or the substance given in other words. Provisions relating to municipal government of Washington, etc., are not included.

character and such as may be called obsolete." Cox, *Code* (1898) p. vii; see H. Rep. No. 1017, 56th Cong., 1st Sess. 4. For source material Judge Cox relied largely on Abert & Lovejoy's *Compiled Statutes* (listed as as No. 8 in footnote

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"5. Compilation of the Laws in Force in the District of Columbia, April 1, 1868. Washington, Government Printing Office, 1868, 494 pages.

"This compilation contains no preface or explanation of its scope. It gives the text of the laws, arranged by subjects. Provisions relating to the municipal government of Washington, etc., are not at all completely included.

"6. Statutes in force in the District of Columbia. Washington, 1872. 639 pages. House Miscellaneous Document No. 25—42d Congress, 3d session.

"This compilation was prepared under the direction of the Legislative Assembly of the District of Columbia. While purporting to be a compilation only, it includes many innovations. It was transmitted by the Governor of the District of Columbia to the House of Representatives, but was never adopted.

"7. Revised Statutes of the United States relating to the District of Columbia. Washington, 1875, 201 pages.

"This revision was enacted by Congress and approved June 22, 1874. It covers all subjects of Federal legislation relating to the District, except local (i e., portions of the District only) and private matters.

"8. The Compiled Statutes in force in the District of Columbia, including the Acts of * * * 1887–'89. Compiled by William Stone Abert and Benjamin G. Lovejoy. Washington, Government Printing Office, 1894, 730 pages.

"This compilation, prepared pursuant to the act of March 2, 1889 (25 Stat. 872, ch. 392), includes acts of Congress, of Maryland, of Great Britain, and of the District of Columbia legislative assembly, with a few annotations. It covers all subjects of legislation except local and private matters. This compilation is wholly unofficial, in that the completed work never received legislative sanction."

33, above). He used the Maryland, Virginia, Ohio, and New York Codes as models. He refrained from any attempt to codify the common law. *Ibid.*

Contemplating introduction of this proposed comprehensive code in Congress, Judge Cox drafted an enacting clause which contained a standard repeal provision "that all laws and parts of laws inconsistent herewith be, and they are hereby, repealed" (Cox, *Code* (1898) p. 1). However, apart from this express repealer, it is plain from the comprehensive scope of the Code and the manifest intention of the draftsman to replace *all* existing statutes particularly applicable in the District that all such statutes would have been repealed by necessary implication, had Congress adopted the Code as originally drafted. Cf. *Hamilton* v. *Rathbone*, 175 U. S. 414, 420. Repealed with them, whether or not replaced by equivalent provisions in the new Code, would have been the 1872 and 1873 Acts.

b. But the Cox code was not submitted to Congress, nor enacted by it, in the form in which it was originally drafted. Judge Cox had divided the code into two parts. The first part contained 61 chapters dealing with various groups of subject matter not easily classifiable under a single head. Among them were chapters relating to the judiciary, probate, adoption, conveyancing, corporations, crimes, divorce, the statute of frauds, wills,

rules of procedure, and numerous others.[34] Judge Cox subsumed them under a single head on the

[34] The complete list of chapter headings under Part I reads as follows:

Chapter
1. The Judiary
2. Abatement
3. Absence for Seven Years
4. Account
5. Actions
6. Administration
7. Adoption of Children
8. Aliens
9. Amendments
10. Apprentices
11. Arbitration and Award
12. Assignment of Choses in Action
13. Assignment of Insolvent Debtors
14. Attachments
15. Bonds and Undertakings
16. Condemnation of Land for Public Use
17. Constables
18. Conveyancing
19. Corporations
20. Creditors' Suits
21. Crimes and Punishments
22. Descents
23. Divorce
24. Ejectment
25. Estates
26. Evidence
27. Execution
28. Exemptions
29. Fees of Officers and Others
30. Frauds, Statute of
31. Fraudulent Conveyances and Assignments

Chapter
32. Guardian and Ward
33. Habeas Corpus
34. Husband and Wife
35. Interest and Usury
36. Joint Contracts
37. Joinder of Parties and Causes of Action
38. Judgment and Decrees
39. Landlord and Tenant
40. Liens
41. Limitation of Actions
42. Mandamus
43. Marriage
44. Name, Change of
45. Negligence Causing Death
46. Negotiable Instruments
47. Partners
48. Payment of Money Into Court
49. Pleadings and Practice in Relation Thereto
50. Practice, Rules of
51. Process
52. Quo Warranto
53. Replevin
54. Set-off
55. Sureties
56. Tender
57. Third Party Procedure
58. Uses and Trusts
59. Warehousemen
60. Waste
61. Wills

basis that they were "of immediate interest to our profession and litigants." Cox, *Code* (1898) p. viii. The second part of the draft code was captioned: "The Organization and Administration of the Municipal Government of the District of Columbia." It contained some 44 chapters, which dealt either with the internal organization, financing, or administration of the municipal government or with miscellaneous local regulatory and penal provisions enforceable by the municipal government, essentially similar to the 1872 and 1873 Acts here involved.[35]

[35] The complete list of chapter headings under Part II is as follows:

Chapter		Chapter	
1.	The Commissioners	15.	Gas
2.	Anatomical Science, Promotion of	16.	Harbor Regulations
3.	Avenues, Streets and Alleys	17.	Health Officer
4.	Barbed Wire Fences	18.	Highway Extension
5.	Board of Children's Guardians	19.	Jail
6.	Cemeteries and Disposal of Bodies	20.	Licenses
7.	Commissioners of Deeds and Notary Public	21.	Medical and Dental Colleges
8.	Dentistry, Practice of	22.	Medicine and Surgery
9.	Dogs	23.	Metropolitan Police
10.	Drainage of Lots	24.	Militia
11.	Female Help in Stores	25.	Milk, Regulating Sale of
12.	Fire Department and Safety From Fire	26.	Oleomargarine
13.	Flour, Inspection of	27.	Pawnbrokers
14.	Game and Fish	28.	Pharmacy
		29.	Physicians, Testimony of
		30.	Plumbing and Gasfitting
		31.	Prisoners in the Jail and Workhouse

Before its introduction in Congress, Judge Cox's draft was reviewed by special committees of the Board of Trade and the Bar Association and by other interested persons. 9 Rep. Wash. Bd. of Trade 20–21, 134 (Nov. 1899); 10 *id.* 5–7, 138–142 (Nov. 1900). The special committee of the Board of Trade reported as follows (10 *id.* at 139):

> * * * it was found impossible, in the time at command, to thoroughly review the second or *municipal part of Judge Cox's code. So that the code as submitted to Congress contained only the first or general part of the code touching matters of general jurisprudence.* It is very important that Congress should take action looking to a proper revision of the second or municipal part of the code, but any action on the part of the Bar must be deferred until a suitable commission can be appointed by Congress to undertake that work. [Italics supplied.]

(See also H. Rep. No. 1017, 56th Cong., 1st Sess., p. 5.)

Chapter		Chapter	
32.	Public Schools	39.	Subdivision of Land in County
33.	Recorder of Deeds	40.	Surveyor
34.	Reform School for Boys	41.	Taxes, Collection of
35.	Refuse, Disposal of	42.	Washington Humane Society
36.	Snow, Removal of	43.	Water
37.	Steam Engineering and Boiler Inspection	44.	Weights and Measures
38.	Street Parking		

In accordance with this decision, only the first of the two parts of the original Cox code was included in the bill which was introduced in the 55th Congress. S. 5530, 55th Cong., 3d Sess. This bill contained a new repeal clause, Section 1662, which read as follows:

> SEC. 1662. *All English statutes* and parts of statutes *general and permanent in their nature,* all like acts and parts of acts of the general assembly of the State of Maryland, *all like acts* and parts of acts *of the legislative assembly of the District of Columbia,* and all like acts and parts of acts of Congress applying solely to the District of Columbia, in force in said District on the day of the passage of this Act, *are hereby repealed, except acts relating to the municipal affairs of the District of Columbia not covered by this code,* such as acts relating to the organization and powers of the Board of Commissioners of said District; the health officer of said District, his powers and duties; the Metropolitan police; the fire department; the collection of taxes; the Board of Children's Guardians; the Reform School for Boys; the Reform School for Girls; the Washington Humane Society; highway extension; avenues, streets, and alleys; street parking; licenses; medicine and surgery; pharmacy; medical and dental colleges; practice of dentistry; promotion of anatomical science; militia; public schools; water supply and

water rates; weights and measures; harbor regulations; barbed-wire fences; dogs; drainage of lots; female help in stores; game and fish; inspection of flour; steam engineering and boiler inspection; inspector of buildings; plumbing and gas fitting; gas; electric lighting; privies; removal of snow, and disposal of garbage and other refuse; *Provided,* That the incorporation into this code of any general and permanent provision taken from an Act making appropriations, or from an Act containing other provisions of a private or temporary character, shall not repeal nor in any way affect any appropriation or any provision of a private or temporary character contained in any of said acts, but the same shall remain in force. [Italics added.]

Like Section 1636 in its final form, this repeal clause is divisible into two parts. The first, up to the word "except," constitutes the general repeal provision, and the second, after the word "except," contains a list of exceptions to be saved from repeal. In the light of the prior history of the Cox code, the reason for the division is clearly evident. The general repeal provision was obviously an attempt to encompass in broad terms the repeal of all laws which were replaced by Part I of the Cox draft. It sought to describe such laws as acts "general and permanent in their nature," which were probably as satisfactory as

any other adjectives which might have been used. The large bulk of the provisions contained in Part I was derived from acts of the Maryland legislature which were generally applicable throughout that state.[36] The saving part of the

[36] The subject-matter of Part I of the Cox draft code (see footnote 34, *supra*) bears a striking similarity to that of the then-existing Maryland code, which Judge Cox used as a model. The chapter headings of the Maryland Code of Public General Laws (Poe ed., 1888) are as follows:

Article
1. Rules of Interpretation
2. Agents and Factors
3. Aliens
4. Almshouses and Trustees of the Poor
5. Appeals and Error
6. Apprentices
7. Arbitration and Award
8. Assignment of Choses in Action
9. Attachments
10. Attorneys at Law and Attorneys in Fact
11. Banks
12. Bastardy and Fornication
13. Bills of Exchange and Promissory Notes
14. Bills of Lading, Storage and Elevator Receipts
15. Bounding Lands
16. Chancery
17. Clerks of Courts
18. Commissioners to Take Acknowledgments
19. Comptroller
20. Constables
21. Conveyancing
22. Coroners
23. Corporations
24. Costs
25. County Commissioners
26. Courts
27. Crimes and Punishments
28. Crows
29. Currency
30. Deaf, Dumb and Blind—Education of
31. Debt—Public
32. Dentistry
33. Elections
34. Estrays—Vessels Adrift—Drift Logs
35. Evidence
36. Fees of Officers
37. Ferries
38. Fines and Forfeitures
39. Fish and Fisheries
40. General Assembly
41. Governor
42. Habeas Corpus
43. Health

section, excepting from repeal "acts relating to the municipal affairs of the District of Columbia not covered by this code" was due to recognition of the incomplete state of the code, and

Footnote 36—(Continued)

Article
44. Hospital—Maryland
45. Husband and Wife
46. Inheritance
47. Insolvents
48. Inspections
49. Interest and Usury
50. Joint Obligations and Joint Tenancy
51. Juries
52. Justices of the Peace
53. Landlord and Tenant
54. Land Office
55. Librarian—State
56. Licenses
57. Limitation of Actions
58. Live Stock
59. Lunatics and Insane
60. Mandamus
61. Manures and Fertilizers
62. Marriages
63. Mechanics' Lien
64. Merger
65. Militia
66. Mortgages
67. Negligence Causing Death
68. Notaries Public
69. Officers
70. Official Oaths
71. Ordinary and Inn Keepers and Retailers
72. Oysters
73. Partnerships—Limited
74. Pilots

Article
75. Pleadings, Practice and Process at Law
76. Publication of Laws
77. Public Education
78. Public Printer
79. Releases and Receipts
80. Reporter—State
81. Revenue and Taxes
82. Riots
83. Sales and Notices
84. Seamen
85. Secretary of State
86. Sheep and Dogs
87. Sheriffs
88. Slander of Females
89. Statistics and Information as to Branches of Industry
90. Sureties
91. Surveyor
92. Terrapins — Diamond Back
93. Testamentary Law
94. Time—Standard
95. Treasurer
96. United States
97. Weights and Measures
98. Wharves and State Wharfinger
99. Wild Fowl — Birds and Game
100. Work — Hours of, in Factories

was undoubtedly intended to save all acts not meant by Judge Cox to be replaced by Part I of his draft—that is to say, all acts which he regarded of such a nature as properly to be dealt with (either incorporated, replaced by something else, or omitted) in Part II of his original draft. The clause goes on to list specifically a number of examples of subjects to be saved, each of which was included within the subjects covered by Judge Cox under Part II of his original draft.

The Code did not pass in the 55th Congress, but it was reintroduced in the 56th, and passed with only minor changes. See H. Rep. No. 1017, 56th Cong., 1st Sess. The repeal provision became Section 1636; and, in order to avoid the necessity of a long list of exceptions corresponding with the chapter headings of Part II of the Cox code, an attempt was made to comprehend the subject matter of the saving provision in a shorter grouping. Eight groups of exceptions were specified, six of which, excluding the third and the fifth, related solely to acts of Congress. The fifth, penal statutes authorizing punishment by imprisonment for less than a year, or by fine, and the third, was broad enough to include at least some acts of the Legislative Assembly. And the correspondence between the "except" clause and Part II of the original Cox draft is sharply emphasized by the parallel between the language of the third exception of Section 1636 and the title to Part II of Judge Cox's code. The latter

speaks of "the organization and administration of the municipal government"; the former speaks of "acts relating to the organization of the District government * * * and generally all acts and parts of acts relating to municipal affairs only * * *."

2. *Effect of Sections 1636 and 1640 on the 1872 and 1873 Acts*

a. Consideration of this legislative history leads to several conclusions concerning the effect of the enactment of the 1901 Code on the 1872 and 1873 Acts. The Code was plainly not intended to replace the entire then existing body of statutory law.[37] It constituted only a partial code and, under settled principles, repealed only those acts which were specifically repealed or which by necessary implication were either inconsistent

[37] After enactment of the 1901 Code, its incomplete nature was generally recognized, and unsuccessful efforts were made to codify the parts contained in the original Cox draft but omitted from the law as enacted. The Board of Trade stated in a report in 1902 that the Code was only a "partial codification of suitable laws to govern this District" and the "citizenry continued to seek further enactment and codification of all laws relating primarily to this District." 12 Rep. Wash. Bd. of Trade 23 (Nov. 1902). The Special Legal (Codification) Committee of the Board of Trade urged in 1903 (13 Rep. Wash. Bd. of Trade 119 (Nov. 1903)):

"It will be recollected that the District Code, as originally prepared by Mr. Justice Cox, contained a municipal as well as a general Code. For various reasons, the efforts of the Bar Association Committee, and of this Committee have been, up to the present time, confined to the procuring of the enactment of the present Code. This would seem to be a proper time for taking up the neglected municipal portion.

with or replaced by some provision contained in it. Cf. *Cape Girardeau County Court* v. *Hill*, 118 U. S. 68, 72; *United States* v. *Claflin*, 97 U. S. 546.

This history also shows that the effect of Section 1636 was no broader than this. Section 1636 achieves no result that would not have occurred by operation of law without express provision. Nothing in its terms suggests an intention to affect a wider class of laws than was reached by the necessary implication of enacting inconsistent or substitute provisions.[38] The close parallel between the bifurcation of the original Cox code and the division of Section 1636 into a repealing clause and a contravening saving clause

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The public necessity for such a code is greater today than ever."

For several years the Washington Board of Trade and others continued to urge the enactment of a municipal code. 14 Rep. Wash. Bd. of Trade 7, 28 (Nov. 1904); 15 *id.* 35 (Nov. 1905); 17 *id.* 43, 149 (Nov. 1907); 19 *id.* 34, 117 (Nov. 1909); 20 *id.* 39 (Nov. 1910). In 1908, Senator Gallinger introduced S. Res. 97 in the 60th Congress "to create a Commission to prepare a Municipal Code for the District of Columbia," but the bill died in committee. 42 Cong. Rec. 7017; 18 Rep. Wash. Bd. of Trade 39, 163 (Nov. 1908).

[38] In answer to the suggestion that the provision should not be construed as mere surplusage, it may be pointed out that the inclusion of similar clauses repealing "inconsistent prior acts" is a common practice in drafting statutes, even though such clauses are frequently unnecessary to accomplish repeal. The purpose of such clauses is, by making explicit what would otherwise be implicit, to avoid litigation-breeding doubts and uncertainty. See 1 Sutherland, *Statutory Construction* (3d ed. 1943) § 2013, and cases cited.

demonstrates that the intention of Congress was to reach only those acts affected by some provision of that part of Judge Cox's code which was finally adopted.[39]

The language of Section 1636 conforms completely with this purpose. It repeals "acts of" the Maryland legislature "general and permanent in their nature" and "like Acts" of the Legislative Assembly of the District of Columbia. "Like Acts" in this context can mean only "general and permanent" acts. "General and permanent" in this provision has, we think, two meanings. Primarily it serves to distinguish statutes included in the code from statutes private, special, or temporary, which were not included in either part of the Cox code. Judge Cox avoided codification of private laws and such temporary enactments as appropriation measures, and Congress followed suit. The intention to avoid repeal of private acts and temporary acts, including especially appropriations, is directly expressed in the proviso clause of Section 1662 of S. 5530, 55th Congress, the repeal section

[39] Further evidence that the repeal provisions of the Code were meant as a precise parallel to the subjects treated by Part I of the Cox code is to be found in Sections 1 and 1640, both of which saved from repeal the common law, British statutes in force in Maryland in 1801, and the principles of equity and admiralty—all of which Judge Cox deliberately refrained from including within his Part I. All of these reflect Judge Cox's intention to refrain from codifying the common law. See H. Rep. No. 1017, 56th Cong., 1st Sess., p. 4.

of the bill which was the predecessor of the code (see p. 67, *supra*)[40] and was contained in Section 1637 of the Code as finally enacted.

Secondly, the terms "general and permanent" are probably as closely descriptive of the class of subject matter in Part I of the Cox code, and hence in the entire 1901 Code, as any brief categorization could be. Examination of the detailed contents of Part I of the Cox code suggests that the term "general" was used in the sense that most of the provisions of that Part relate to matters which the state legislature of Maryland had treated on a state-wide basis. Compare footnotes 34 and 36, *supra*. And the only acts of the Legislative Assembly which could be regarded as "general and permanent in their nature" would be those which dealt with similar subjects, appropriate for inclusion in Part I of the original Cox code.[41]

In the concrete context of the history and purpose of the Code, therefore, the Acts of 1872 and

[40] The Legislative Assembly had enacted a number of private laws. See, *e. g.*, Act of June 25, 1873, Ch. XVIII, For the Relief of John Newton Berryman; Acts of January 19, 1872, Ch. XIX, XX, For the Relief of Joseph Schwartz and Sarah C. Grantum. It also enacted numerous appropriations.

[41] An example of a "general and permanent" act of the Legislative Assembly repealed by the 1901 Code is the Act of August 23, 1871, ch. CII, amending the Statute of Frauds. Sections 1116–1119 of the Code cover that subject. 31 Stat. 1189, 1367–1368.

1873 were not within the class of "general and permanent" laws repealed by the general repealer clause of Section 1636, however those adjectives might be interpreted abstractly and *in vacuo*. No provision in the 1901 Code, as enacted, is so clearly inconsistent with or so clearly intended to substitute for the 1872 and 1873 Acts as to require the conclusion that they were repealed by implication—repeals which cannot rest on equivocal or ambiguous provisions but only on a "clear and manifest" expression of legislative purpose. See *United States* v. *Borden Co.*, 308 U. S. 188, 198–199, and cases cited.

No provision of the 1901 Code deals with civil rights, racial discrimination, segregation, or regulation of restaurants and similar establishments. Hence there can be no inconsistency nor any suggestion of a substitute provision, replacing the 1872 and 1873 Acts. The Code does contain a chapter dealing with crimes, but the fifth exception to Section 1636 covers "All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both." And it is settled that at least some penal acts of the Legislative Assembly, not codified in the Crimes chapter of the code, survive the enactment of the Code. *Johnson* v. *District of Columbia*, 30 App. D. C. 520.

On the other hand, there are strong reasons for the conclusion that the 1872 and 1873 Acts fell

not only outside the body of "general" legislation replaced by the Code but within the body of laws saved by the failure to enact the second or "municipal affairs" part of Judge Cox's code. Judge Cox's Part II, like his Part I, contained no provision codifying or directly replacing these Acts. However, we emphasize that even if this negative fact were all the evidence available, the presumption against repeal would require the conclusion that the Acts were not repealed by the general repealer clause of Section 1636.

b. In any event, the Acts of 1872 and 1873 were specifically saved from repeal by the exception clauses contained in Section 1636 (particularly the third and fifth exceptions) and by Section 1640.

These Acts are intrinsically indistinguishable from the class of laws specifically dealt with by Part II of Judge Cox's original draft code. Such laws are expressly saved from repeal by the third exception of Section 1636, saving "acts * * * relating to * * * police regulations, and * * * municipal affairs only." This exception, as we have shown *supra*, p. 63 *et seq.*, is as broad in coverage as the "municipal affairs" part of the original Cox code. And it clearly comprehends the Acts of 1872 and 1873. Both are "police regulations" in the sense of the Code—

exercises of the municipal police power[42]—and both are, for the reasons we have suggested, acts "pertaining to municipal affairs."

Like many of the acts pertaining to "municipal affairs" specifically contained in Part II of the Cox draft, the 1872 and 1873 Acts are in the nature of penal regulations based upon a governmental exercise of the police power. See, *e. g.*, Cox, *Code* (1898) Part II, ch. 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 25, 26, 27, 28, 30, 35, 36, 37, 38. (See footnote 35, *supra.*) We need not repeat here the arguments and materials contained in the dissenting opinion of Judge Fahy in the court below (R. 102–110) which support the conclusion that these Acts are "local" and "municipal." (And see pp. 46–54, *supra.*) The Acts are enforceable by the municipal government. They are local in scope, affecting only persons and

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[42] See, especially, *Johnson* v. *District of Columbia*, 30 App. D. C. 520, upholding a conviction under a cruelty-to-animals statute enacted by the Legislative Assembly in 1871. The Court of Appeals for the District of Columbia held that that statute, which does not essentially differ from the 1872 and 1873 Acts here involved, was saved from repeal by the "police regulations" exception of the 1901 Code. And cf. *United States* v. *Cella*, 37 App. D. C. 433, holding that a prosecution under the federal "bucket shop" statute, 35 Stat. 670, was properly brought in the name of the United States, since the statute was not a local "police or municipal regulation" which had to be enforced in the name of the District, under Section 932 of the 1901 Code (31 Stat. 1189, 1340). The court defined (p. 435) a "municipal ordinance or police regulation" as "peculiarly applicable to the inhabitants of a particular place—in other words, it is local in character."

establishments within the District. They relate to conditions existing chiefly within urban areas. And their subject-matter is of a kind which is widely dealt with, and in variously different ways, by cities. These resemblances between the Acts in question and the acts covered by the omitted part of the Cox code bring these Acts far outside the ambit of the repeal provisions of the 1901 Code.[43]

For very similar reasons, if express saving language be necessary, the provisions of Section 1640 of the Code, saving from repeal "any municipal

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[43] For examples of acts which pertain to municipal affairs and which are not police regulations, see, *e. g.*, Cox, *Code* (1898) Part II, Ch. 1, 2, 3, 5, 7, 23, 24, 33. The respondent points out that the eighth saving provision of Section 1636 expressly saved from repeal a list of statutes pertaining, with one exception, to the regulation of various aspects of pharmacy, medicine and hospitals. It argues that if the "police regulations" or the "municipal affairs" exception of the third saving provision were broad enough to comprehend such regulatory legislation, the specific enumeration of the statutes listed in the eighth clause would be unnecessary. But we see no inconsistency in specifically enumerating the acts listed in the eighth exception, even though the general language of the third exception might be broad enough to include them. All the acts listed in the eighth exception were acts of Congress, as are all the acts listed in the First, Second, Fourth, Sixth, and Seventh exceptions. All except one of them dealt with regulated subjects of interest to the medical profession, a well-organized group of the community which would have preferred that the question of repeal *vel non* of such laws should not be left in any possible doubt. For these reasons, it seems likely that the specific enumeration of these acts was dictated not by a belief that they were not covered by other general language but merely by an excess of caution.

ordinance" also covers the Acts of 1872 and 1873. Section 1640, like the second part of Section 1636, expresses the clear intention of Congress to refrain from touching, by its enactment of the Code, anything comprehended by the "municipal affairs" part of the Cox draft, or anything not plainly replaced by the Code.

It is noteworthy that at least one compiler of District statutes subsequent to enactment of the 1901 Code regarded the 1872 and 1873 Acts as still in effect. See Meyers, *Comprehensive General Index of the Laws of the District of Columbia in force January 1, 1912.* And evidence that the 1872 and 1873 Acts were contemporaneously regarded as "police regulations" and "pertaining to municipal affairs" is to be found in a proposed codification of statutes in force in the District, transmitted to Congress by the Governor of the District of Columbia in 1872. The 1872 Act was included as Chapter XI under "Title XII—Of the Internal Police and Municipal Regulations." H. Misc. Doc. No. 25, 42nd Cong., 3rd Sess., pp. 190, 219.

Finally, these Acts are clearly embraced within the fifth exception to Section 1636, which reads:

> Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

The Acts of 1872 and 1873 are included within this exception, unless excluded because of the

provision for forfeiture of licenses for one year. But that provision is not a "punishment" in the criminal sense; it is an additional civil sanction imposed upon offenders. *Federal Communications Commission* v. *WOKO*, 329 U. S. 223, 228; *Ex parte Wall*, 107 U. S. 265, 288; *Hawker* v. *New York*, 170 U. S. 189, 199–200; *L. P. Steuart & Bro.* v. *Bowles*, 140 F. 2d 703 (C. A. D. C.), affirmed, 322 U. S. 398; *Nichols & Co.* v. *Secretary of Agriculture*, 131 F. 2d 651, 659 (C. A. 1); *Board of Trade of City of Chicago* v. *Wallace*, 67 F. 2d 402, 407 (C. A. 7); *Wright* v. *Securities and Exchange Commission*, 112 F. 2d 89, 94 (C. A. 2).

B. *The acts were not repealed by non-enforcement*

Judge Prettyman's concurring opinion in the court below expressed the view that the 1872 and 1873 Acts have been "abandoned" and are now unenforceable. The argument is that the Acts must be regarded as conditions imposed on the licenses of restaurants, and hence that the Commissioners' action in issuing licenses for many years without insisting upon such conditions was tantamount to abandonment or implied repeal of the Acts.

This argument is wholly unfounded. It is based upon a misconception of the nature of the Acts and of the powers of the Commissioners. The premise that the 1872 and 1873 Acts were

mere conditions, imposed by an administrative licensing authority, on the licenses of restaurants in the District is refuted by the express terms of the Acts. The further assumption that the licensing authority of the present Commissioners includes the power to revoke sanctions imposed on licensees by Acts of the Legislative Assembly does not take into account the Congressionally imposed limitations upon the powers of the Commissioners. Moreover, the Commissioners have never taken any action which purported to effect a repeal of these Acts. The short of the matter is that Judge Prettyman, while disavowing such a purpose, was in effect applying a doctrine, for which he conceded that there is no authority whatever, of implied repeal of legislation by non-enforcement.

1. It has long been recognized that mere failure of the executive or administrative agency charged with the enforcement of a penal or other statute to prosecute violations of it cannot repeal the statute. The power to repeal legislation resides in the legislature, and no other branch of the government can exercise it, either expressly or by any implication arising from its inaction. "A failure to enforce the law does not change it." *Louisville & N. R. R.* v. *United States,* 282 U. S. 740, 759; and see *United States* v. *Morton Salt Co.,* 338 U. S. 632, 647–648; *Kelly* v. *Washington,* 302 U. S. 1, 14; *Chicago, B. & Q. R. R.*

v. *Iowa*, 94 U. S. 155, 162; *Costello* v. *Palmer*, 20 App. D. C. 210, 220."

2. Judge Prettyman recognized this rule. He sought to avoid its consequences, however, by arguing that the result should be otherwise because the provisions of the 1872 and 1873 Acts amounted to conditions upon the licenses granted to restaurants. On their face, however, the Acts are penal legislation and not conditions on the grant of the privilege of doing business. They do not provide for the issuance of licenses, nor do they prescribe terms for licenses. Their provisions apply to existing businesses, already

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" See also *Standard Oil Co.* v. *Fitzgerald*, 86 F. 2d 799 (C. A. 6); *McKeown* v. *State*, 197 Ark. 454, 124 S. W. 2d 19; *Parker* v. *Board of Dental Examiners*, 216 Cal. 285, 14 P. 2d 67; *State* v. *Burr*, 79 Fla. 290, 84 So. 61; *Shutt* v. *State ex rel. Cain*, 173 Ind. 689, 89 N. E. 6; *State* v. *Mellor*, 140 Md. 364, 117 Atl. 875; *Naughton* v. *Boyle*, 129 Misc. 867, 223 N. Y. Supp. 432; *Beers* v. *Hotchkiss*, 135 Misc. 796, 238 N. Y. Supp. 463; *State* v. *Nease*, 46 Ore. 433, 80 Pac. 897; *Nashville, C. & St. L. Ry.* v. *Baker*, 167 Tenn. 470, 71 S. W. 2d 678; *Gulf Refining Co.* v. *Dallas*, 10 S. W. 2d 151 (Tex. Civ. App.)

Judge Prettyman cited, but refrained from relying upon, dicta in a few early cases suggesting that long non-user of a statute which has become "obsolete" might make it unenforceable. See, *e. g.*, *Wright* v. *Crane*, 13 S. & R. 447, 452 (Pa.); *Porter's Appeals*, 30 Pa. St. 496, 499; *Snowden* v. *Snowden*, 1 Bland. 550, 555 (Md. Ch.). But the cited opinions go no further than to suggest a possible doctrine of repeal of obsolete statutes by non-user. In each case the unenforced statute was held to be still in effect. We know of no case where a statute was held to have become unenforceable merely because of "obsolescence" or "non-user." *District of Columbia* v. *Robinson*, 30 App. D. C. 283, contained language looking toward "obsolescence" of a colonial Sunday

licensed, as well as to businesses thereafter to be licensed.

The mere fact that the Acts apply to businesses which are subject to licensing requirements does not make them conditions of the licenses. Wage and hour legislation, child labor legislation, and many other kinds of regulatory acts also apply to licensed businesses, but it could not be suggested that such legislation is meant only as a condition to the issuance of a license by an administrative licensing authority. These laws are purely regulatory.

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law of Maryland. But the case amounts only to a holding that the law, in so far as it was based on religious premises, constituted an establishment of religion, and in so far as it was supportable as a secular exercise of the police power, had been repealed by subsequent comprehensive legislation. Among the other cases cited by Judge Prettyman, *Hill* v. *Smith*, Morris 70, 76–79 (Iowa Terr.) was clearly based upon repeal of the statute in question by subsequent inconsistent acts of Congress, and the Supreme Court of Iowa, as Judge Fahy points out, has since rejected the doctrine of repeal by non-user (see *Pearson* v. *International Distillery*, 72 Iowa 348, 357, 34 N. W. 1, 5–6); and *James* v. *Commonwealth*, 12 S. & R. 220 (Pa.) involved only a common law punishment.

Moreover, the scattered dicta in the few early cases cited almost all referred to situations where the statutes involved were truly obsolete, in the sense that their purposes no longer had vitality or significance in serving the needs of any substantial portion of the community. The contrary situation exists in this case. At the very least, it may be said that the 1872 and 1873 Acts serve ends which are as much alive for a substantial part of the community as they were when enacted.

It is true that one of the sanctions provided for violation of the Acts is forfeiture of the offender's license, but the statutory imposition of this sanction does not mean that the penal provisions were intended as terms of the license. Cf. *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419, 442. The Acts do not require compliance with their terms as a prerequisite to the issuance of a license.

3. Moreover, it is by no means clear, even if the Acts could correctly be called conditions upon the licenses of restaurants, that so to label them would require the conclusion that they have been revoked by any action of the present licensing authority. Clearly, the Commissioners have not purported expressly to revoke or repeal the Acts by any regulations of their own. Nor have they enacted regulations covering the subject of race discrimination or segregation in restaurants. (See the detailed discussion of this point in Judge Fahy's dissenting opinion, R. 114–117.) The respondent points to no terms of any license issued by the Commissioners imposing duties inconsistent with their duties under the Acts. Any repeal must be by implication of some inaction on the part of the Commissioners.

Repeals by implication are never favored, and we think that this rule is as applicable in weighing the effect of a course of conduct by an executive or administrative body as in considering the

meaning of a statute claimed to repeal an earlier act. This is especially true where, as here, there is a serious question of the power of the agency to effect a repeal. The question in this case is not merely one of a licensing body's revoking regulations or conditions formerly imposed by it, or even by a predecessor licensing authority. It is a question of the power of the present licensing body to revoke laws enacted by a former body having entirely different powers and functions.

Moreover, as has been shown, these Acts of the Legislative Assembly were in effect reenacted by Congress in the Organic Act of 1878, and, if not repealed by the 1901 Code, continued in force since that date to the same extent as if they had originally been enacted by Congress (*supra*, p. 55). Surely it could not be suggested that the Commissioners were authorized, by any action or inaction, to repeal statutes of Congress. But, even if these Acts had only the status of laws of the Legislative Assembly validly enacted under authority delegated by Congress, we think it would still be true that the Commissioners did not repeal these Acts.

The powers of the Commissioners under the present form of government are far more limited than those of the Legislative Assembly under the Organic Act of 1871. (See footnote 14, *supra*.) The Legislative Assembly was vested with "legislative power and authority" (Section 5) with-

held from the Commissioners, whose functions are largely administrative and executive. See *District of Columbia* v. *Bailey*, 171 U. S. 161, 176; *Roth* v. *District of Columbia*, 16 App. D. C. 323; *Coughlin* v. *District of Columbia*, 25 App. D. C. 251, 254; *United States ex rel. Daly* v. *MacFarland*, 28 App. D. C. 552; *Dennison* v. *Gavin*, 3 MacA. 263 (D. C.). Even on the assumption that the Commissioners had power to revoke license conditions fixed by the Legislative Assembly, the failure of the Corporation Counsel to institute prosecutions under the Acts which might have resulted in convictions requiring the Commissioners to initiate license revocation proceedings, cannot reasonably be treated as equivalent to deliberate actions of the Commissioners implying an intention to repeal the Acts.[45]

CONCLUSION

For the reasons stated, it is respectfully submitted that the Acts of 1872 and 1873 are valid and still in full force and effect. The judgment of the Court of Appeals should be reversed with

[45] In any event, as Judge Fahy pointed out, if the Commissioners could repeal statutory license conditions on an *ad hoc* basis, they could revive them the same way (R. 119): "To repeal a regulation is to make a regulation, and whoever can do the one can do the other. The abandonment argument in the end destroys itself in so far as this case is concerned, for if these regulations can be placed out of operation by non-use on the part of District officials they can be put back into operation by use on the part of the same officials."

directions that the case be remanded to the Municipal Court for trial.[46]

HERBERT BROWNELL, JR.,
Attorney General.

ROBERT L. STERN,
Acting Solicitor General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

T. S. L. PERLMAN,
Attorney.

APRIL 1953.

[46] The information on which this case is based was brought in four counts. The first count alleged violation of the Act of 1872; the remaining three counts were based on the 1873 Act. The respondent contended in the court below that the 1872 Act was entirely superseded by the 1873 Act. In the view taken by the majority in the court below, that both Acts were repealed, the court below did not pass upon this contention.

The omission from the 1873 Act of some businesses regulated by the 1872 Act constitutes no inconsistency suggesting repeal of the 1872 Act in its entirety. Rather, it suggests the preservation of each Act, in so far as each applies to different businesses. On the other hand, it seems unlikely that the Legislative Assembly intended to double the penalties on restaurants, which are named in both Acts, while leaving them unchanged with respect to some of the other establishments. It would follow, if the two Acts are to be construed harmoniously, that only the later statute should apply to violations by restaurants.

Neither the court below nor the Municipal Court of Appeals passed on the question of the effect of the 1873 Act upon the 1872 Act, and we do not think that this Court should do so. On remand to the Municipal Court for trial, it will be open in that court for the Corporation Counsel to drop the first count, based on the 1872 Act, if he so chooses. In any event, even if the first count should remain in the case, this question of "double penalties" would not arise unless respondent were convicted on all four counts and a separate, cumulative sentence were imposed as to each count.

APPENDIX

1. The pertinent provisions of the Constitution of the United States read as follows:

> Article I, Section 8, Clause 17:
>
> The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings * * *.
>
> * * * * *
>
> Article IV, Section 3, Clause 2:
>
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. The pertinent provisions of the Organic Act of 1871, c. 62, 16 Stat. 419, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all that part of the territory of the United States included within the limits of the

District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.

* * * * *

SEC. 5. *And be it further enacted,* That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. * * *

* * * * *

SEC. 17. *And be it further enacted,* That the legislative assembly shall not pass special laws in any of the following cases, that is to say: For granting divorces; regulating the practice in courts of justice; regulating the jurisdiction or duties of justices of the peace, police magistrates, or constables; providing for changes of venue in civil or criminal cases, or swearing and impaneling jurors; remitting fines, penalties, or forfeitures; the sale or mortgage of real estate belonging to minors or others under disability; changing the law of descent; increasing or decreasing the fees of public officers during the term for which said officers are elected or appointed; granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatsoever. The legislative assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual

to the District or to any municipal corporation therein, nor shall the legislative assembly have power to establish any bank of circulation, nor to authorize any company or individual to issue notes for circulation as money or currency.

SEC. 18. *And be it further enacted,* That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.

* * * * *

SEC. 20. *And be it further enacted,* That the said legislative assembly shall not have power to pass any ex post facto law; nor law impairing the obligation of contracts, nor to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents; nor shall lands or other property in said district be liable to a higher tax, in any one year, for all general objects, territorial and municipal, than two dollars on every hundred dollars of the cash value thereof; but special taxes may be levied in particular sections, wards, or districts for their particu-

lar local improvements; nor shall said territorial government have power to borrow money or issue stock or bonds for any object whatever, unless specially authorized by an act of the legislative assembly, passed by a vote of two thirds of the entire number of the members of each branch thereof, but said debt in no case to exceed five per centum of the assessed value of the property of said District, unless authorized by a vote of the people as *hereinafter* [hereinbefore] provided.

3. The pertinent provisions of the District of Columbia Code of 1901 (Act of March 3, 1901, 31 Stat. 1189) read as follows:

SECTION 1. The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provisions of this code.

* * * * *

SEC. 1636. All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the

day of the passage of this act are hereby repealed, except:

First. Acts and parts of acts relating to the rights, powers, duties, or obligations of the United States.

Second. Acts and parts of acts relating to the Court of Claims.

Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

Fourth. Acts and parts of acts relating to the militia.

Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

Sixth. Acts and parts of acts of Congress relating solely to the Departments of the General Government in the District of Columbia, or any of them.

Seventh. Acts or parts of acts authorizing, defining, and prescribing the organization, powers, duties, fees, and emoluments of the register of wills of the District of Columbia and his office.

Eighth. An act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating

the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; an act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health.

All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code.

* * * * *

SEC. 1640. Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of

the principles of equity or admiralty, or of any general statute of the United States not locally inapplicable in the District of Columbia or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.

4. The Act of the Legislative Assembly of the District of Columbia of June 20, 1872, ch. LI, reads as follows:

Be it enacted by the Legislative Assembly of the District of Columbia, That keepers or owners of restaurants, eating-houses, bar-rooms, or ice-cream saloons, or soda-fountains, at which food, refreshments or drinks are sold, or keepers of barber shops and bathing houses, must put in a conspicuous place in their restaurant, eating-houses, ice-cream saloons, or places for the sale of soda water, a scale of the prices for which the different articles they have for sale will be furnished.

SEC. 2. *And be it further enacted,* That persons violating the provisions of the above section are to be deemed guilty of misdemeanor, and, upon conviction in a court having jurisdiction, are to be fined by the court not less than twenty dollars, and not more than fifty dollars.

SEC. 3. *And be it further enacted,* That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respect-

able well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices, as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture.

The Act of June 26, 1873, ch. XLVI, reads as follows:

Be it enacted by the Legislative Assembly of the District of Columbia, That the proprietor or proprietors, or keeper or keepers, of every licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or establishment in the District of Columbia, shall put up, or cause to be put up, and to be regularly kept up, or cause to be kept up, in two conspicuous places in the chief room or rooms of his, her, or their restaurant, eating-house, bar-room, ice-cream saloon, or soda-fountain room, and in one conspicuous place in each small or private

room, if any, used in connection with said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room, for the accommodation of guests, visitors, or customers thereat, printed cards, or papers, on which shall be distinctly printed the common or usual price for which each article or thing kept in any of said places or establishments to be eaten or drank therein is or may be commonly sold, or the price or prices for which the articles or things are or may be commonly or usually furnished to persons calling for, desiring, or receiving the same or any part or parts thereof, and no greater price or prices than those mentioned or contained on said cards or printed papers shall be asked for, demanded, or received from any person or persons for any of the articles or things kept in any manner for sale in any of the places or establishments aforesaid, either by said proprietor or proprietors, keeper or keepers, or by their agents, employes, or any one acting in any manner for them.

SEC. 2. *And be it further enacted,* That on or before the first day of November in each year the proprietor or proprietors, keeper or keepers, of each licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room or establishment in said District, as aforesaid, shall transmit to the Register of said District a printed copy of the usual or common price or prices of articles or things kept for sale by him, her, or them, as aforesaid, which shall be filed by the Register in his office, and unless he is notified of changes therein, the copy transmitted and

filed in said office may be used in any case or proceeding under this act as prima facie evidence of the common or usual prices charged for the articles or things mentioned therein by the proprietor or proprietors, keeper or keepers, of any of the places or establishments aforesaid, and in a failure of any proprietor or proprietors, keeper or keepers, to transmit the copy aforesaid, the Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him.

SEC. 3. *And be it further enacted,* That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment: *Provided,* That persons of different sexes shall not be accommodated in the same room or rooms unless they accompany each other, or call for any articles or things together, or unless said room or rooms are ordinarily used indiscriminately by persons of both sexes.

SEC. 4. *And be it further enacted,* That if the proprietor or proprietors, keeper or keepers, of any place or establishment, as aforesaid, shall neglect or refuse to put up printed cards or papers of prices as pro-

vided for in the first section of this act, or shall refuse to send a copy or duplicate to the Register, as provided in the second section, or shall place or cause to be placed on said card or paper, or permit to be placed thereon any price or prices other or greater than that for which any article or thing is, or may be, usually and commonly sold or furnished by him, her, or them, or different from or more than is usually or commonly demanded or received therefor by him, her, or them, or by his, her, or their authority or direction, or shall demand or receive in any manner, or under any circumstances, or for any reason or pretence, in person or by any employe or agent, from any person or persons aforesaid, any sum or prices different or greater than is contained on said cards or papers, or than is usually and commonly asked or received for any article or thing kept for sale as aforesaid, or shall refuse or neglect, in person or by his, her, or their employe or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or shall refuse or neglect to sell at the common and usual prices aforesaid in and at his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, to any such person or persons therein at said prices, any article or thing kept therein and in the room or rooms in which such articles or things are ordinarily sold and served or allowed to be eaten or drank, or shall at any time or in any way or manner, or under any circumstances, or for any reason, cause, or

pretext, fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated at said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: *Provided,* That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law.

SEC. 5. *And be it further enacted,* That all acts and parts of acts inconsistent herewith are hereby repealed.

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